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REAUTHORIZATION OF OMB'S OFFICE OF INFORMATION AND REGULATORY AFFAIRS

HEARINGS

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1742

FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

FEBRUARY 21, 22, 1990

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REAUTHORIZATION OF OMB'S OFFICE OF INFORMATION AND REGULATORY AFFAIRS

WEDNESDAY, FEBRUARY 21, 1990

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn, Chairman, presiding.

Present: Senators Glenn, Bingaman, Lieberman, and Heinz.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. The hearing will be in order.

This morning we begin 2 days of hearings on S. 1742, the Federal Information Resources Management Act of 1989. This bill is very important legislation, sponsored by Senators Bingaman and Lieberman. The Paperwork Reduction Act of 1980, the PRA, established the Office of Information and Regulatory Affairs—OIRA, as it is known—within the Office of Management and Budget to integrate and provide central management for the Federal Government's information and regulatory policy functions.

S. 1742 provides a 2-year reauthorization to fund OIRA's activities. It also proposes a comprehensive refinement of the responsibilities and functions of OIRA, makes a number of amendments to the PRA, and establishes a study commission on Federal information. Clearly this bill is an ambitious and a constructive effort to update and build on the 1980 act.

I have asked our witnesses to focus their comments on the provisions of S. 1742 and to be as specific as possible. We want views on what works, what won't, and what needs to be changed.

But before turning to our first witness, let me comment on the issues we intend to explore in the next 2 days.

The Paperwork Reduction Act of 1980 was a legislative response to the Commission on Federal Paperwork, which started in 1977. It was a bipartisan group led by President Carter, Senators Chiles and Danforth, and Congressmen Brooks and Horton which brought about this law that replaced the old 1942 Federal Reports Act.

The idea behind the PRA was that there was a need to centralize and better manage the Federal Government's information policy functions: ADP, telecommunications, records management, reports clearance, privacy, and statistical policy.

In the face of exploding information needs for our Government agencies, it was the hope that this approach to better managing the

Government's information resources would minimize the burden of paperwork requests upon the public and maximize the usefulness and quality of information collected.

When President Carter signed the law, he declared its intent was to, "regulate the regulators." The premise underpinning the PRA was that every citizen would be assured that the Federal Government had checked for the necessity of collecting information before the public was asked to report, keep records, or otherwise provide information.

Paperwork was made the symbol, and its reduction was made the responsibility of OMB's Office of Information and Regulatory Affairs. Upon coming to office, President Reagan followed President Carter's precedent and assigned responsibility to OIRA for reviewing regulations through Executive Orders 12291 and 12498.

While the information and paperwork aspects of regulatory review are related to one another in the Executive Orders, there are considerations in the Orders which go beyond the paperwork reduction functions of the PRA.

The linking of the paperwork clearance process with the Executive Order regulatory review process has been a source of controversy and concern. Some see benefits to this linkage, while others argue that OIRA's other responsibilities are given less attention, and that too much power, secrecy, and abuse prevail.

When this Committee took up the reauthorization of the Paperwork Reduction Act in 1986, when Senator Roth was Chairman, these issues received attention, and amendments to the Act were made. They were intended to increase public participation and to provide for more sunshine and accountability to Congress by OIRA.

Today we will hear from witnesses who will argue that not enough was done in 1986. They will assert that OIRA has imposed an ideological agenda on agencies, circumvented the will of Congress, and, in general, micromanaged the affairs of other agencies.

I am also mindful that the paperwork burden is increasing rather than decreasing. I think some of the figures are rather startling. And we plan to get into these tomorrow to validate them. But according to the Business Council on Reduction of Paperwork—BCORP, as it is known—it has estimated that American business—and these figures are amazing to me—American business spends some 8.2 billion hours at a cost of $330 billion a year responding to paperwork requests. If those numbers are correct, that figures to be about 6.3 percent of our total GNP.

Now, these are the figures that have been given to us by BCORP, and I don't know whether we will get into that tomorrow when I believe we will have one of their witnesses here. But I wanted to put those figures out to indicate the enormity of the problem we are dealing with. It is a huge, huge figure. Even if it's off by a factor of three or four, it is still a tremendous, tremendous figure, and a great impact on our GNP.

Clearly there is a need for more effective mechanism. Whether you are a small-business person, Government contractor, State or local grantee, teacher in the classroom, senior citizen seeking Medicare benefits, university researcher, or a taxpayer, I can fully appreciate why one would support Congress sending a strong signal it wants paperwork kept under control.

S. 1742 proposes language to deal with all these concerns. Under the bill the information and paperwork clearance process is made more effective and the disclosure requirements for the regulatory review process as well as for other agency submissions are strengthened. I will be very interested in the witnesses' comments on these provisions.

S. 1742 also looks to the future by adding a public dissemination policy function to OIRA. This supplements the emphasis the bill gives to information resources management as a strategy for meeting the PRA's intended purposes.

In 1980, hardly anybody had a personal computer. Now they are all around us. This is just one example of the explosion in information technology which presents tremendous opportunities for reduced burden, increased access, and better use of more quality information.

There are a number of other important proposals made in S. 1742, and I look forward to the testimony of our witnesses this morning.

Before we start with that, Senator Heinz, do you have an opening statement?

Senator HEINZ. Mr. Chairman, just a brief comment, and I would ask unanimous consent that my full statement be placed in the record.

Chairman GLENN. Without objection, so ordered.

OPENING STATEMENT OF SENATOR HEINZ

Senator HEINZ. Mr. Chairman, when the Paperwork Reduction Act first went into effect back in 1980, the Federal paperwork burden was 1.5 billion hours. By 1987 it was up to 1.9 billion hours. It is hard to know whether we should blame the Reagan Administration or ourselves. And I will not attempt to do that.

I think it is fair to say that we are all aware of the enormous burden that paperwork, the accumulation of information, hopefully not for its own sake, does impose on people, businesses, senior citizens, and a variety of interests in this country. It is estimated that that burden comes to some $330 billion annually.

As a matter of fact, recently I learned the result of this burden through two of my constituents, Ms. Carol Miller, and Dr. Earl Hess of Lancaster Laboratories in Lancaster, Pennsylvania. They testified before the Government Information and Regulation Subcommittee, that their lab, which employs a total of five full-time workers, has been turned into a "paper factory," as they described it, generating data required by Federal regulators. Clearly we need to reauthorize this act.

There is the issue, of course, of whether or not the length of the review process and the proportion of requests in the areas of health and safety and the environment, which on occasion have appeared to move more slowly or rejected disproportionately by OIRA and that still remains a problem. But I must say, Mr. Chairman, that while I continue to be concerned about delays caused by OMB in the implementation of these much needed regulations, I am very much encouraged by the efforts of the Bush Administration—and we will hear through Mr. MacRae later—to improve the quality of the regulatory review process. I am here, among other things, to urge their continued attention to that issue.

[The prepared testimony of Senator Heinz follows:]

PREPARED STATEMENT OF SENATOR HEINZ

Mr. Chairman, I want to thank you for holding today's hearing on S. 1742, the "Federal Information Resources Management Act of 1989." This legislation will reauthorize the Paperwork Reduction Act and make significant changes in Federal information policy.

Information collection is an important activity of the Federal government. Requests for information affect virtually every Federal program and activity from the decennial census and collection of taxes to regulating the health and safety of American workers and the environment. The majority of these requests are necessary for implementation of government programs but in some instances they become excessive and unnecessary, creating a paperwork burden upon businesses, state and local government and individuals.

The Paperwork Reduction Act (PRA) was enacted by Congress in 1980 to lessen the paperwork burden placed upon the public by the Federal government. However, it has met with questionable success. A June 1989 report prepared by the General Accounting Office stated that the total Federal paperwork burden increased from 1.5 billion hours in Fiscal Year 1980 to 1.9 billion hours in fiscal year 1987. Even though the reporting requirements have changed somewhat, that is an increase of 27 percent.

During hearings held by the Government Information and Regulation Subcommittee in June, the Business Council on the Reduction of Paperwork testified that in their estimation a total of 13 billion hours a year is spent by the public and business in complying with Federal paperwork requirements and businesses alone spend $330 billion annually in compliance.

Small businesses, in particular, often do not have the resources to easily comply with these requirements. Ms. Carol Miller and Dr. Earl Hess of Lancaster Laboratories, Inc. in Lancaster, Pennsylvania testified before the Subcommittee that their lab, employing five full-time workers, had been turned into a "paper factory" generating data required by Federal regulations.

Although a true measure of burden may be difficult to arrive at, the government does require businesses, the agricultural sector, senior citizens and the general public to participate in such a large number of information gathering requests to make reauthorization of the PRA and continued work towards lessening overly burdensome requests necessary. By channeling the Federal government's information gathering efforts through the Office of Management and Budget (OMB) much duplication and unnecessary burden is eliminated.

Concerns have been raised regarding the length of the OIRA review process and the proportion of requests in the areas of health, safety and the environment which were either more slowly reviewed or disproportionately rejected by OIRA. Many cite the PRA as providing OMB an opportunity to exert undue interference in agency rulemaking. I continue to be concerned about delays caused by OMB in the implementation of these much needed regulations. At the same time I am also encouraged by efforts by the Bush Administration to improve the quality of the regulatory review process and urge their continued attention to this issue.

Reauthorization of the PRA provides us with the opportunity to enhance competitiveness by removing the self-imposed barriers of non-essential and costly reporting requirements.

Thank you, Mr. Chairman, and I look forward to hearing from today's witnesses regarding their views on S. 1742.

Chairman GLENN. Thank you.

Senator Bingaman, any comments?

Senator Bingaman chairs our subcommittee that deals with the Paperwork Reduction Act. I know OIRA has done a lot of work on this with his subcommittee staff.

Do you have any comments?

OPENING STATEMENT OF SENATOR BINGAMAN

Senator **Bingaman**. Mr. Chairman, let me just go through a very short version of a statement here and then put some things in the record.

I am very pleased that you are having this set of hearings. The issue that is before us is one that we had several hearings on last summer. As a result I came away from those hearings with three distinct concerns.

First, I was concerned with the issue that you raised and Senator Heinz raised that the paperwork review process is not as effective as it could be and that the paperwork burden continues to grow. I think you can argue about the extent of the growth, but clearly it continues to grow;

Second, I was concerned with the apparent absence of any kind of overall Government policy or strategy, and am convinced that there is a need for an information policy in the Federal Government that recognizes the comprehensive life-cycle management of information.

Third, I was concerned with the regulatory review process, which you have also raised and which Senator Heinz has raised, and am particularly concerned that this regulatory review process appears to be the all-consuming part of the functions or responsibilities of the Office of Management and Budget Office of Information and Regulatory Affairs and it is characterized by unnecessary delays and lack of public accountability.

The Subcommittee staff, at my request, drafted legislation which we circulated for nearly 2 months. We then had several meetings and discussions with interested parties and incorporated many of those comments into a new bill that Senator Lieberman and I introduced on October 6. The concerns that I mentioned are restated in the findings of that legislation, S. 1742, and in the statement that I put in the record of the Senate to accompany the bill.

Perhaps my greatest overriding concern, however, centers on the information infrastructure of the Federal Government. Dr. Boskin said it very well when he said that, "While good, better, and more accurate information may not assure sound decisions in all cases, surely poor information clearly can only lead to good decisionmaking by accident."

I am concerned that there are very serious problems in the bureaucracy that have evolved around Federal information resource management, the gap between information management and agency program planning in particular.

S. 1742 does reauthorize the Paperwork Reduction Act with the emphasis on its original purpose, but it also increases efforts to reduce duplicative Federal information collections and minimize paperwork burdens on the public.

It also tries to strengthen the information infrastructure and statistical database for the Federal Government, and it would set a national information resources management policy which would serve to integrate all information functions.

At this point I will conclude my statement and ask that a more complete statement, a copy of the bill,[1] a section-by-section analysis,[1] a copy of the statement I made when the bill was introduced,[2] and various pieces of correspondence that we have received commenting on particular aspects of the bill,[3] be included in the record.

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[1] See p. 553.

Chairman **Glenn**. Without objection, so ordered.

Senator **Bingaman**. Thank you, Mr. Chairman.

[The prepared statement of Senator Bingaman follows:]

PREPARED STATEMENT OF SENATOR BINGAMAN

I am pleased that Senator Glenn, the distinguished Chairman, and the Committee on Governmental Affairs are holding hearings today and tomorrow on S. 1742, the Federal Information Resources Management Act of 1989. I appreciate the willingness of the Chairman and other Committee members to spend their time on this issue. The legislation reflects a long and intensive effort and, as I look down the witness list, I recognize the names of many individuals and organizations who have been vigorous participants in shaping the legislation. I appreciate the generous guidance and assistance they have given to my staff and to me.

Last summer I chaired several days of hearings on the subject of the quality of Federal information, and on the overall subject of the reauthorization of the Paperwork Reduction Act. I came away from those hearings with three distinct concerns. First, I was concerned that the paperwork review process is not as effective as it could be and that the paperwork burden continues to grow. Second, I was concerned with the apparent absence of any overall government information strategy, and convinced of the need for an information policy for the Federal government which recognizes a comprehensive life-cycle management of information. And, third, I was concerned that the regulatory review process is an all-consuming one for the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and is characterized by unnecessary delays and a lack of public accountability.

The Subcommittee staff, at my direction, drafted legislation which was widely circulated for nearly two months. We then held numerous meetings and discussions with interested parties and incorporated nearly all of the comments into a new bill which I introduced along with Senator Lieberman on October 6, 1989. The concerns I mentioned are restated in the findings of S. 1742, and in my statement which accompanied the introduction of the bill. Perhaps my greatest overriding concern, however, centers on the information infrastructure of the Federal government. As Dr. Michael Boskin, Chairman of the Council of Economic Advisors, stated at one of the hearings: "While good, better, and more accurate information may not assure sound decisions in all cases, surely poor information clearly can only lead to good decision making by accident." I am very concerned that there are very serious problems in the bureaucracy which have evolved around Federal information resources management, particularly the gap between information management and agency program planning.

BACKGROUND

During the 1970's, the Congress established the Commission on Federal Paperwork, which addressed broad issues of information resources management. Subsequently, the Paperwork Reduction Act was enacted by Congress in 1980. The important goals of the Act are undisputed. We must recognize the wisdom, diligence, and bipartisan support which led to its creation and subsequent reauthorization. Special credit goes to Senators Lawton Chiles, Carl Levin, William Roth, David Durenberger, and Representatives Jack Brooks, Frank Horton, and others.

The Paperwork Act was a milestone in responding to pressing matters involving government information. I have found the original act and its 1986 amendments to be far-reaching in its goals and purposes. I am struck by its continuing relevance to our goals and purposes. I am struck by its continuing relevance to our government and society. Its valuable principles include reducing the government paperwork burden, strengthening cost management of information collection, and assisting agencies in information policy planning. I support the continuation of these goals.

We must also be ready to take advantage of the opportunity that is created by the need to reauthorize the law, and address necessary improvements in both the centralized coordination and the agency performance of information management functions. The original act has been reauthorized only once in its 10 year existence, in 1986, as an amendment to the continuing appropriations resolution. Much has taken place since that time, particularly in the areas of informaton needs and technology. We have responsibility to examine how well we are doing in pursuing the goals of the Act and to identify problems and opportunities for improvement. I feel that the debate which has taken place thus far and which continues is healthy.

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[1] See p. 624.

[2] See p. 638.

[3] See p. 797–1010.

S. 1742

S. 1742, the Federal Information Resources Management Act of 1989, would reauthorize the Paperwork Reduction Act with emphasis on its original intent and purposes. It would increase efforts to reduce duplicative Federal information collections and minimize paperwork burden on the public. It would also stengthen the information infrastructure and statistical database of the Federal government, including improving agency capabilities and public access to government information. It would set a national information resources management (IRM) policy, which serves to integrate all information functions within a lifecycle management system in Federal agencies. It would improve the efficiency and effectiveness of OIRA in carrying out all its responsibilities under this law.

STRENGTHENS PAPERWORK REDUCTION EFFORTS

I believe the importance of a strong and ongoing government-wide effort to reduce the burden of unnecessary government paperwork cannot be overstated. A renewed and unified effort by Congress, the Executive Branch, and Federal agencies is required to attack the mountain of paperwork faced by businesses, university researchers, and other individuals. The "Federal Information Resources Management Act" reflects a studied and constructive approach towards addressing this important problem.

S. 1742 reauthorizes existing Federal information collection provisions of law. It continues the overall goal of reducing paperwork by 5 percent each year. It requires OIRA to identify initiatives to reduce paperwork burdens associated with individuals, business, educational institutions, state and local government especially with respect to procurement and Federal grant programs.

IMPROVES INFORMATION RESOURCES MANAGEMENT

Government information must be made a high priority as a valuable and useful resource to government and society. As such, it must be managed in coordination and systematic manner based on established principles of information resources management. OIRA, in conjunction with other government entities with centralized information management responsibilities, must take leadership in developing coherent information policy which gives balanced and needed emphasis to all information functions. Federal agencies must establish parallel, but independent, information resources management programs. The original paperwork act recognizes this need but more needs to be done to strengthen an integrated IRM concept.

OIRA's handling of its statistical policy role must be improved. The Paperwork Reduction Act of 1980 gave OIRA the responsibility for Federal statistical policy, among other functions. Last year, I asked the Office of Technology Assessment (OTA) to look into this questions. Their report "Statistical Needs for a Changing U.S. Economy", demonstrates how our statistical system is woefully out of date. As the OTA study points out, the statistical system has suffered in the past from a lack of funding and from a lack of leadership and coordination. The provision of S. 1742 meet these goals.

REAFFIRMS OIRA RESPONSIBILITY FOR POLICY GUIDANCE

OIRA's responsibility for agency information activities is to ensure that they are well run, not to run them. OIRA's relationship to Federal agencies must be structured to provide policy guidance, not day-to-day approval or disapproval of agency information activities. Federal informaton resources management capabilities must be strengthened, and agencies must take greater responsibility for fulfilling the full range of information functions. S. 1742 provides solutions to this concern.

ESTABLISHES A COMMISSION ON FEDERAL INFORMATION

The Federal information and statistical data system has not kept pace with changes in the U.S. economy and society, and may lack the ability to provide relevant information for future decisions. An in-depth review is needed to ensure that there are ongoing improvements within the system.

The bill establishes a Commission on Federal Information to look at the broad question of the health of the Federal information and statistical systems. The functions of the Commission are to look at the contribution of information to economic and social welfare and to competitiveness, to identify long term information needs, to identify gaps and other problems in the current system especially with respect to quality, timeliness and relevancy, to set priorities for information in light of changes in the economy and society, and to look at how better to organize the information system for better coordination and to ensure that the system is capable of keeping up with changes in the economy and society, and to look at how better to organize the information system for better coordination and to ensure that the system is capable of keeping up with changes in the economy and society.

INCREASES PUBLIC PARTICIPATION AND OIRA ACCOUNTABILITY

There is a need to increase public participation in, and improve the accountability of, OIRA and Federal agency decision making. As I have held other hearings in the Subcommittee, it has become clear that OIRA policies and actions reach far and wide. Whether one is concerned with Census questionnaires, surveys of the educational progress and reading levels of 4th graders, health statistics surveys, food labeling, or warning labels on children's aspirin, this office, OIRA, has left its strong imprint. Sometimes the results have been simple delays, sometimes effective improvements have resulted and sometimes serious policy changes have occurred which can alter the scope and breadth of proposed Federal regulations and who they effect. S. 1742 proposed what I think are modest steps to endure accountability and I believe that such steps need to be established.

STRENGTHENS FEDERAL LEADERSHIP AND OVERSIGHT

Without question Congress and the Executive Branch must provide stronger leadership, management, and guidance, and conduct oversight to ensure that the purposes and objectives of the Act are met. I think S. 1742 addresses these needs as well.

CONCLUSION

In conclusion, I ask that a more detailed fact sheet, a copy of the bill, the section-by-section analysis prepared by the Congressional Research Service, and my statement which accompanied introduction, all be made a part of the hearing record.

I believe we have produced a solid piece of legislation and I look forward to the comments of the witnesses and other interested parties. I am confident that with the constructive help of other witnesses and others we can produce a reauthorization that addresses the concerns I have and creates a framework for effective information management throughout the Federal government.

Again, I look forward to the help of all interested parties and I look forward to the testimony of our witnesses.

Chairman GLENN. Senator Levin?

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman.

Mr. Chairman, one of the portions of this bill relates to the OMB regulatory review process, which has been the subject of controversy for 9 years. It is that portion I want to focus on very briefly.

The controversy began when President Reagan signed an Executive Order in February of 1981. It was Executive Order 12291. OMB review of rules, which is what that order provided, was included in the omnibus regulatory reform bill, S.1080, in the 97th Congress. A tremendous amount of work was put into that bill, but it was never enacted into law. It included a standard for OMB review of rules as well as a time limit.

I proposed legislation in subsequent Congresses that addressed the public disclosure procedures, and though that legislation passed our Committee, Mr. Chairman, it too was not enacted into law.

After hearings in what was then called the Intergovernmental Relations Subcommittee, Senator Durenberger and I were able to work out an agreement with the Reagan Administration to implement most of the disclosure procedures contained in the legislation just described. Those procedures were established by memo from the OIRA director to each agency.

Those procedures, while going a long way, have still not satisfied many critics. So, today the bill that we are considering, would not only put those disclosure procedures into statute but would add additional requirements as well, including a time limit on the OMB review period.

I am supportive of the basic elements of this bill, Mr. Chairman, including the proposed time limits. I prefer, however, to have any legislatively mandated procedures be conditional upon the President's decision to have a review process in the OMB in the first place.

By making these procedures conditional, we would not be mandating the OMB review process itself, but only controlling it if in fact one is established.

I commend Senators Bingaman and Lieberman and their staffs for the hard work that they have put into this legislation. It is a difficult, comprehensive piece, an important piece of legislation. And, Mr. Chairman, I would appreciate if the record were kept open, if I have questions for the record.

Chairman GLENN. The record will be kept open.

Senator Lieberman, do you have an opening statement? I know you have worked very closely with Senator Bingaman on this bill. Joe.

Senator LIEBERMAN. Thank you, Mr. Chairman. I thank you for holding these hearings.

And I thank Senator Bingaman for his dedication and effort in drafting what I think is a very difficult but very important piece of legislation. I am proud to be a cosponsor.

Mr. Chairman, I have a statement which I would like to include in the record and then just speak a few words.

Chairman GLENN. Without objection, it will be included.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Mr. Chairman, I regret that I cannot be here for most of the hearing today because I am involved in the negotiations with the Administration on the Clean Air Act.

But I must say that those negotiations convince me again of how important this piece of legislation is, because if—and I believe, when—the Clean Air Act is adopted, it is going to have to be enforced; regulations will be carried out and paperwork will result, and this act goes right to the heart of all of that.

I associate myself with the comments that my colleagues have made on the question of paperwork reduction. Let me just briefly address the question of regulatory review authority.

Over the past decade the Office of Information and Regulatory Affairs in OMB has reviewed proposed agency regulations pursuant to two Executive Orders, one requiring a cost-benefit analysis and one requiring an analysis of whether agency activities are consistent with the President's policies and priorities.

Unfortunately, OIRA all too frequently used its authority under these orders to change or delay regulations that the Administration disagreed with on policy grounds, and, in some cases, to actually stifle regulations that were proposed by independent agencies that have been created by Congress.

In particular, OIRA squelched safety and environmental regulations, many of which languished at OMB for months or years awaiting approval.

There are many notorious examples of these, including proposed regulations concerning Tampons and toxic shock syndrome, manufacture and use of asbestos, air emissions from the chemical industry, warnings about aspirin and Reye's syndrome, and the testing of infant formulas, just to name a few.

OIRA's review process was not revealed to the public. There were long delays. There was, ultimately, no accountability. Even the agencies involved were often unaware of communications and meetings between OIRA and industry representatives.

Mr. Chairman, I am hopeful that the Bush Administration will be more sensitive to congressionally mandated action in general and to the need for safety and environmental regulations in particular.

But nonetheless, the historical record provides a basis for reasonable restrictions on the regulatory review process. And that is exactly what S. 1742 does: It recognizes the President's authority to review proposed regulations, but it also imposes reasonable procedural restrictions.

OMB itself must consider the kinds of restrictions that are in S. 1742 as reasonable because OMB accepted nearly identical limits in an administrative agreement with the leaders of the House Government Operations Committee last November.

But I feel very strongly that it is necessary to put those procedural guidelines into the law. An agreement between one or two Members of Congress and OMB simply does not have the force of law. If it does not have the approval of either House of Congress or of the President, it is ultimately binding on no one.

And while I respect the current director of OMB and certainly believe that he will honor this agreement that he has reached with Members of the House, there is no guarantee that his successor will do that. It seems to me that on a more general policy level that, when significant problems arise in Government, we ought to address them through the legislative process which is mandated by the Constitution, not through side agreements that are of uncertain authority. Retreating to an unbinding agreement between one or two Members of Congress and an agency really does not set a good precedent for resolving significant issues of public policy.

That is why I think that dealing with these issues legislatively is the way to go, although it is by no means an incursion into Executive authority. On the contrary, this legislation clearly recognizes the Executive's authority to enforce the law, but accepts the reality that Congress can set up structures and procedures for guiding the Executive in doing so.

We have routinely and repeatedly set procedural limitations and deadlines on agency rulemaking powers in a host of areas. We designate agencies that are, after all, to be members of the President's Cabinet, and we fund the entire Executive Branch, including, incidentally, OMB. So it seems to me that creating guidelines for OIRA's regulatory reviews is very much within Congress' purview and makes sense as a matter of public policy.

Mr. Chairman, I thank you for giving me the opportunity to make that statement.

[The prepared statement of Senator Lieberman follows:]

PREPARED STATEMENT OF SENATOR LIEBERMAN

Mr. Chairman, I want to thank you for holding these hearings and Senator Bingaman for dedication in drafting this difficult and important piece of legislation. Paperwork reduction and information policy may be dry issues, but they are crucial to the successful operation of the federal government. The government relies on the cooperation of businesses, state and local governments, and individuals in providing needed information, and if they are overwhelmed by needless paperwork, their cooperation will be difficult to obtain. And we are plainly in need of a coherent policy within the federal government on acquisition, storage, retrieval and dissemination of all kinds of information and data. S. 1742 goes a long way toward establishing an intelligent national information policy, and I am proud to be a co-sponsor.

The bill also contains reasonable, and in my view, critically important, guidelines concerning OMB's regulatory review authority. Over the past decade, the Office of Information and Regulatory Affairs in OMB has reviewed proposed agency regulations pursuant to two Executive Orders—one requiring a cost-benefit analysis and one requiring an analysis of whether agency activities are consistent with the President's policies and priorities.

Unfortunatley, OIRA all too frequently used its authority under these orders to change or delay regulations that the Administration disagreed with on policy grounds, in some cases, to stifle regulations proposed by independent agencies mandated by the Congress. In particular, OIRA squelched safety and environmental regulations, many of which languished at OMB for months or years awaiting approval. There are many notorious examples, including proposed regulations concerning tampons and toxic shock syndrome, the manufacture and use of asbestos, air emissions from the chemicals industry, warning about aspirin and Reyes syndrome, and testing of infant formulas, to name a few. OIRA's review process was not revealed to the public; even the agency involved was often unaware of communications and meetings between OIRA and industry representatives.

Past abuses are not a reason for eliminating a centralized review of agency action by OMB, and I am confident that the Bush Administration will be more sensitive to congressionally mandated action in general and to the need for safety and environmental regulations in particular. Nonetheless, the historical record does provide a basis for reasonable restrictions on the regulatory review process.

S. 1742 does just that—recognizes the Executive's authority to conduct a review of proposed regulations, while imposing reasonable procedural restrictions. These include moderate time limits on the length of OIRA's review, public record-keeping requirements, and some limitations on ex parte contacts. OMB itself must consider these restrictions reasonable, since it accepted nearly identical limits in an "administrative agreement" with the leaders of the House Government Operations Committee last November.

It is necessary, however, to put these procedural guidelines into the law. An agreement between one or two members of Congress and OMB does not have the force of law. It does not have the approval of either the Congress or the President, and it is binding on no one. The current Director of OMB will undoubtedly honor the agreement reached with the House members; his successor may not, and need not, honor it. It seems to me that when significant problems in government arise, the government ought to address them through the legislative process mandated by the Constitution. This seems particularly true where, as in this case, the problem entails some conflict between the executive and legislative branches. Retreating to an unbinding agreement between one or two members of Congress and an agency does not set a good precedent for resolving significant issues of public policy.

Dealing with these issues legislatively is by no means an incursion into Executive authority. On the contrary, it recongizes the Executive's authority. Congress cannot implement and enforce the law, but it can set up structures and procedures for doing so. Congress routinely sets procedural limitations and deadlines on agencies' rulemaking powers, designates agencies that are to be members of the President's Cabinet, and funds the entire Executive Branch, including OMB. Creating guidelines for OIRA's regulatory reviews—guidelines with which OMB agrees in substance—is within Congress' purview, and makes sense as a matter of public policy.

I look forward to hearing the witnesses today and to working with you, Mr. Chairman, to enact this legislation.

Chairman GLENN. Thank you very much.

I have a statement from Senator Rudman who was unable to be with us today and will insert it into the record at this point.

[Senator Rudman's opening statement follows:]

OPENING STATEMENT OF SENATOR RUDMAN

Mr. Chairman, I appreciate this opportunity to comment on this issue at hand. The purpose and history of this law are well known to the Committee and have already been discussed at length, so I shall not repeat that information here. Suffice to say that I believe the Paperwork Reduction Act is an important law which deserves to be reauthorized. Businesses, local governments, and individuals are all affected by federal paperwork compliance, and these people look at us in Congress to provide relief from unnecessary regulatory burden.

The authorization for this Act expired September 20, 1989. The delay in renewing this law has centered around the role of OIRA, particularly with respect to its role on behalf of the president in reviewing regulations proposed by executive agencies. This is a sensitive issue which has been around for a decade, and with which I have had extensive experience. In 1982, Senator Levin, Senator Durenberger, and I proposed and the Senate passed legislation governing this issue. Although that measure did not become law, it led to an agreement between Congress and OMB Director Miller in 1986 which the White House is still complying with today.

I have no problem with the Committee choosing to revisit this issue. However, that debate should not come at the expense of the Paperwork Reduction Act itself, which has now been without reauthorization for five months.

For this reason, I intend to introduce legislation reauthorizing the Paperwork Reduction Act. This is a straightforward bill which reauthorizes the Act for four years until September 30, 1993, and raises OIRA's authorized funding level from $5.5 million to $6 million per year.

This bill is not necessarily a substitute for S. 1742, which contains many worthwhile provisions; rather, it is intended to return the focus of Members to the goals of the Paperwork Reduction Act. Coming from New Hamsphire, I am particularly sensitive to the needs of small businesses which have the hardest time with federal paperwork compliance. Many of small businesses must hire accountants and other specialists merely to understand government forms, let alone to begin complying with them. When excess time and money is spent on federal paperwork, it is diverting resources which could be applied to improve management and productivity. Small businesses employ 40 million people in this country and account for over half of new jobs. Stemming and reducing the burden of federal paperwork does more than simply alleviate unnecessary or duplicative information requests; it is good for the entire ecomony. It is time once again for Congress to show that it is sensitive to the need to reduce the burden of federally-imposed red-tape upon the public.

Mr. Chairman, I appreciate this opportunity to comment on this very important issue.

Chairman GLENN. Our first witness this morning is our colleague, Senator Paul Sarbanes.

Paul, welcome to our hearing. We look forward to your statement.

TESTIMONY OF HON. PAUL S. SARBANES, U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Thank you very much, Mr. Chairman. I have a full statement which I would ask to have included in the record.[1]

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[1] See p. 105.

Chairman **Glenn**. Without objection, so ordered.

Senator **Sarbanes**. It has been provided to the members of the Committee, and I will briefly extract from it.

I am very pleased to be with you today. I do so primarily in my role as Vice Chairman of the Joint Economic Committee. S. 1742, which reauthorizes the Paperwork Reduction Act, which expires this year, in my view would significantly strengthen the provisions of that act with respect to Federal statistical policy. This is the specific item I want to focus on this morning.

I commend Senator Bingaman, the principal author of that legislation and the chairman of the Subcommittee on Government Information and Regulation of this Committee for the very constructive work which he is doing in this area.

As Senator Bingaman said in his opening statement, there are a number of considerations you have to try to balance here. On the one hand we are out obviously to try to reduce paperwork, and that is a very important consideration. At the same time, we want OMB to operate in a common-sense, I guess, pragmatic, practical way.

I am going to give you one instance, I think, in which that did not take place in the past. In the end it was straightened out, but only with a lot of hard work. And OMB's actions could well have jeopardized the census. And I think they were action driven largely by ideology and a refusal really just to see the common-sense importance of matters.

As you know, serious questions have arisen at various times over the manner in which the Office of Information and Regulatory Affairs in OMB has exercised its authority. Now, the Joint Economic Committee was drawn into this question by the controversy which erupted over the census questionnaire.

The JEC, over the years, has closely tracked the Federal statistical programs and has sought to assure the maintenance of very high standards in those programs. Often this effort involves highly technical issues in which the broader public perceives little apparent interest—until, of course, statistical information which was previously taken for granted becomes either unavailable or unreliable.

Full and reliable statistical information does not in itself constitute or guarantee sound policy, but good, solid, and timely information is critical in sound policy decision-making.

The Japanese, who emulate us in so many ways and then seem to move on, have in the postwar period instituted a first-rate statistical system. They place such a value on it that they have an annual month-long celebration which is called the Month of Statistics, this month has a slogan which a couple of years ago was, "Statistics are the beacon of our happy life." Now, I am not here today to press this upon the Committee, but I simply want to underscore that point.

Let me talk very directly about the difficulties which arose with the census and the pressure that OIRA brought to bear on the statistical programs.

At that time, a questionnaire was being prepared for the dress rehearsal for the 1990 census. This was back in July of 1987. The previous month, the Census Bureau, pursuant to the requirements of the Paperwork Reduction Act, had formally submitted the proposed questionnaire to OIRA for approval.

Five weeks later, OIRA invoked its authority under the Act to direct the Census Bureau to remove some 30 questions, roughly one-third of the questionnaire. Now, the Census Bureau had been engaged in developing the questionnaire in consultation with a very broad range of users and providers. As we know, the decennial census is the major source of information about the Nation, whereby we identify changes and trends, are able to define and refine policy questions. It is also the basis on which we do subsequent surveys over the next decade.

It is anything but a hit-or-miss affair. It is developed carefully over time. The dress rehearsal, which is sort of the final stage, plays a critical role in its development. Preparation began literally years before to develop the short form which goes to all households, and the long form which goes to a smaller sample.

In fact, preparations for the 1990 census, which is just about to happen, began under the direction of the Bureau of Census in 1983—1983. Discussions and consultations were held on a continuing basis. These involve all Federal agencies, including OMB and OIRA, State and local Governments, and the public and the private sector.

In 1984, OIRA established and subsequently chaired the Federal Agency Council on the 1990 census. In the mid-1980's, the Census Bureau conducted a variety of census pretests. In every instance, the form was approved by OMB. In fact, as late as May of 1987, when Senate and House subcommittees of jurisdiction met to review the contents of the census questionnaires, there was no indication from OMB of any concern or dissatisfaction.

I want to make this very clear. Beginning in 1983, work began on the questionnaire for the 1990 census. OIRA, in 1984, established the Federal Agency Council on the 1990 census, and charted it. They worked that over the next 3-year period with the various agency users and the Census Bureau to develop the questionnaire. Everything seemed to be moving along. The congressional committees were maintaining proper oversight.

In June, working through this process, the Census Bureau submitted the questionnaire to be used for the dress rehearsal. And then all of a sudden, a bombshell hit with the unexpected OMB directive of July 24, 1987, to the Census Bureau.

It was as unexpected as it was sweeping. Under this directive, as I have indicated, the questionnaire would have been reduced by approximately one-third eliminating virtually all questions relating to housing.

The sample for the long form—that is, the number in the sample—would have been significantly reduced in size, so much so that many doubted the validity of the long form based on that smaller sample.

The Census Bureau at the time was directed to respond to OMB within 2 weeks. It was in response to this, what was perceived by many, including myself, as an arbitrary and capricious OMB action, that we held a hearing in the Joint Economic Committee on August 7.

At that hearing, then-OIRA Administrator Wendy Gramm described their July 24th action as merely one of raising "staff-to-staff discussions."

The Census Bureau saw it very differently, however, and said in a published statement that OMB had "informed the Census Bureau that roughly 30 questions would be dropped" from the questionnaire.

OMB was trying to portray it as simply discussions. Census saw it as a directive or an instruction to the Bureau in terms of how to develop this questionnaire, which had been brought along this far.

The August 7 hearings put on record the widespread concern, indeed alarm, of decisionmakers in the public and private sectors over the probable adverse consequences for the 1990 census of this OMB directive. We held an extended hearing, whose record I will submit to the Committee, which contains dozens of communications received by the JEC from data users all over the country, in the private sector, in State and local Government, expressing their concern over what was taking place.

I wish we could say that OMB reconsidered its position and the questionnaire then moved along smoothly after that hearing, particularly since OMB had been involved in the process of developing the questionnaire from the very beginning. One of the difficulties was that these questions were not raised as the thing developed, but only at the last minute. It threw everything into confusion because by that time the Census Bureau was moving on a well-defined time schedule and the dress rehearsal was an integral part of moving forward to the final questionnaire, of getting it prepared in time for the 1990 census.

I never realized the amount of advance preparation that has to go into this matter.

In fact, the dress rehearsal was carried out on March 20, 1988, with a number of questions completely deleted, others transferred from the short form to the long form, and the sample size severely restricted.

Concern on the part of all prospective data users mounted in the wake of this dress rehearsal. About 2 weeks later, 30 of us in the Congress, of both parties, wrote to the President about this matter. Our letter took no position on the contents of the questionnaire but urged the President to assure that the questionnaire for the 1990 census would reflect the best professional judgment of the Census Bureau.

What we perceived happening was that a very carefully developed, professional questionnaire reflecting the judgment of some of our most able and competent people was simply being overridden by OIRA.

Shortly thereafter, after this letter to the President, OMB agreed to a questionnaire that, in the opinion of the Census Bureau, met that fundamental criterion.

In the end, I believe the best professional judgment of the responsible statistical agency was vindicated and upheld and the integrity of the decennial census was preserved. But the 9-month controversy was unnecessary, harmful, and costly.

Now, finally, Mr. Chairman, let me simply make the point that roughly a year following this census controversy, I think a recon-

Francisco, but I know what you're saying and I agree with you. We have got to invest in our kids and in our families, and in Head Start.

I'm on the Education and Labor Committee. You know, if we get a child care bill through, it will provide little more than $1 billion. How do we work in cooperation with you, with the church, to really make it clear to our President that we have got to reorder our priorities, if we're going to go forward into the 21st century? How do we do it?

I'm a new member, by the way, and I'm feeling that sense of frustration.

Bishop SULLIVAN. Let me just tell you, in my history of working, I have always found Government as an ally. I mean, I have never found them as the problem. I found that the people who are really involved, particularly at the top levels, they are as committed and sincere and so on, and you could really develop the kinds of local partnerships. But the difficulty is—I mean, Charlie may not believe that the issue is what's right and just. I think it's an issue of values; what do we put as first in our values? What really counts in this society? What do we really put our values on? Do we put our values on our families and our kids? If we do, you will find allies all over the place.

I am always impressed by the people that come out to the inner cities. I go around and do confirmations at parishes. I look at all the people who invest in these kids, with their family. They put in time and effort and these kids are their hope, you know. You look at them. They may be a handful in comparison to the number of kids out there. But it can't be solely Government officials and it can't be solely the President. It's all the way through society. We need leadership and we need people who are willing to articulate leadership, where it's not just partisan.

The role of Government, it seems to me, and the church, is to build caring communities. That's why it's not one side or the other. It's both sides together. I don't point the finger at people. I look at the mirror. I say hey, if this thing's not working, I'm part of the problem. I just think there's a reservoir of tremendous talent and energy, and people want to do it, but people are afraid. With this drug thing, people are afraid.

I was saying to Ron White before I came, I said we look at Colombia and we say boy, that government is in trouble, and you get judges who go on strike. I'm not so sure you could hold this committee meeting in Brooklyn. I don't know if anybody would show up and testify. I don't think too many people want to tell you what's going on in Brooklyn about the drug problem. I'm not so sure you could go in there without having heavy security, if people thought you were going to expose them. That's how bad it is.

I mean, that's not meant to be a threat. It's meant to say that's the reality. The inner-city neighborhoods are taken over by people who basically really have a very demonic way of looking at life. You can't expect a little mother, with two young kids, to be the one who is going to stand up against this thing. It takes a lot more interest and it takes a lot of leadership from the private and public sector. But it won't be done by either side. It has to be done together.

Mr. MacRae, welcome to our hearing this morning. We look forward to your statement or an abridged version thereof. In either event, the entire statement will be included in the record.

TESTIMONY OF JAMES B. MacRAE, JR., ACTING ADMINISTRATOR, AND DEPUTY ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET [1]

Mr. MacRae. Thank you very much, Mr. Chairman.

I am pleased to be here today to discuss S. 1742, the Federal Information Resources Management Act of 1989. This bill would authorize appropriations for the Office of Information and Regulatory Affairs in OMB to carry out the Paperwork Reduction Act of 1980. This bill also instructs Federal agencies and OMB to improve the collection, management, and sharing of Federal information in a number of ways.

OMB Director Darman recently sent you formal comments on this bill. Our letter discusses in some detail a number of different concerns we have with S. 1742. Rather than repeat them all here, I would like to make some general observations. I request the letter be included as part of this formal statement.[2]

Chairman Glenn. It will be included, without objection.

Mr. MacRae. Thank you, Mr. Chairman.

My first observation is that this bill has both desirable and undesirable features. We are anxious to work with you to build upon the many improvements in current law that the bill contains. However, certain of its provisions are, in our view, so seriously flawed that the President's senior advisors would recommend that the bill be disapproved if it were presented to him in its present form.

As to the desirable features, S. 1742 appropriately recognizes the increasing importance of information as a valuable Federal resource and the need for the Federal Government to give increased attention to its management. In particular, its provisions related to information dissemination, sharing, privacy, security, and records management highlight areas where special focus is required. In this bill, for the first time Congress proposes to set forth a policy framework stipulating how all Federal agencies should behave with respect to information dissemination.

In the Freedom of Information Act and other legislation, Congress has addressed access to information; that is, how agencies should act when the public requests information. S. 1742 proposes to instruct agencies concerning their responsibilities for actively sharing information over and above requests from the public. This is a major step forward and will greatly assist OMB in discharging its general information policy functions under the act.

We also support the bill's amendments to language respecting the Federal information locator system. Many parties inside and outside Government now agree that a Governmentwide inventory of information products would be beneficial to the agencies themselves as well as to the public. Just how to go about constructing a useful inventory is a matter deserving careful attention. S. 1742 provides for an inventory and authoritative register of information collection requests, while recognizing that the feasibility and means of accomplishing a more comprehensive inventory of information products will require further study.

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[1] See p. 112 for Mr. MacRae's prepared statement.

[2] See p. 270.

OMB also supports the bill's provisions with respect to the management of public records and the Privacy Act. We have suggested certain technical corrections to the privacy provisions. We agree that records management, an aspect of information resources management, deserves the strengthening S. 1742 would provide.

Two of the most objectionable features of the bill are the following.

First, new sections 3506(d) and 3518 would require that OIRA maintain a public file of all communications regarding any OIRA review while deliberations with the agencies were occurring and regardless of whether the communications were deliberative and predecisional.

These disclosure and review provisions would apply to a wide range of activities engaged in by OIRA staff, including procurement, telecommunications, statistical policy, and information technology functions, as well as budgetary, legislative, and program oversight support of OMB generally.

These provisions would also place greater restraints on the Executive Office of the President than on the agencies that report to the President. They are contrary to the principles that work fairly well in connection with the Administrative Procedure Act and the Freedom of Information Act.

The Department of Justice believes, and I understand its letter has been delivered to the Committee, that these provisions strike at the very heart of the President's constitutional authority over agency rulemaking by opening to public scrutiny deliberative materials generated as a result of the regulatory review process under Executive Orders 12291 and 12498.

Second, the separation in S. 1742 of OIRA's budget and administrator from the rest of OMB needlessly fragments, in our view, an already small OMB. OIRA has the task of coordinating efforts of all other parts of OMB in the areas of paperwork reduction, information technology, regulatory review, statistical policy, and the development of information policy. Separating OIRA from the rest of OMB would make orderly management of these issues impossible, and eliminate OIRA's ability to assure integrated review among each of these areas.

Rather than detailing our concerns, which are described in the letter, I would like to make some general historical observations. OMB's statutory authority to review and approve or disapprove collections of information by Federal agencies began in 1942. As to this paperwork clearance function, the OMB review program has not changed in any basic way.

To quote from the Federal Reports Act of 1942, it was then, and still is, the policy of Congress that "information needed" by Federal agencies "should be obtained with a minimum burden upon business enterprises, especially small business enterprises, at a minimum cost to the Government. All unnecessary duplication should be eliminated. Information collected should be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public."

OMB was then, and still is, authorized to disapprove an agency's collection of information if the OMB director finds that "the collection of such information is unnecessary, either because it is not needed for the proper performance of the functions of such agency or because it can be obtained from another Federal agency or for any other reason."

Over the past 48 years, the original statute has been amended and the program has grown—but, I submit, quite slowly and only after careful and deliberate consideration. In 1965 Congress enacted the Brooks Act giving OMB a central role in managing information technology. In 1974, it enacted the Privacy Act and established the Commission on Federal Paperwork.

In 1977 the Commission on Federal Paperwork, chaired by Congressman Frank Horton and Senator Thomas J. McIntyre, issued its recommendations. These recommendations led to the overall revisions of the Federal Reports Act of 1942 that became the Paperwork Reduction Act of 1980.

As its first basic change, Congress strengthened the OMB paperwork clearance function in 1980. OMB's review authority was expanded by statute specifically to include recordkeeping requirements and information collections contained in regulations. Congress also added the "public protection" provision that prohibits an agency from subjecting any private party to a penalty for "failing to maintain or provide information to any agency" that had not obtained OMB approval under the act.

In 1980, Congress also codified a sunset review principle that has long been implemented by OMB, and GAO as well, when it shared paperwork oversight responsibilities with OMB. That had then been adopted by presidential Executive Order. Under this procedural safeguard, OMB cannot approve a collection of information for a period in excess of 3 years.

This restriction forces agencies to: one, resubmit periodically each ongoing information collection for OMB review; two, give notice to the public of agency and OMB reconsideration; and, three, invite the public and respondents to suggest improvements or to point out unreasonable burdens.

In 1980 Congress also expanded the scope of OMB's review function beyond that traditionally covered by the Federal Reports Act of 1942 in order to strengthen information resource management in the agencies and OMB's counterpart oversight. Specifically, the act established a single statutory and organizational framework under which OMB was to develop Federal information policies and guidelines concerning Federal statistical activities, records management activities, privacy of records, interagency sharing of information, the acquisition or use of automated data processing, telecommunications, and information resource management in general.

In 1986, Congress amended the Paperwork Reduction Act further. It clarified OMB's paperwork clearance function to make it clear that all information collections, whether or not they were contained in regulations, are to be treated the same in terms of the review process. Congress also amended the Act to assure the public had additional information about OMB's review of agency information collections to enable it to participate fully and meaningfully.

Building on this statutory guidance, OIRA also amended its paperwork clearance regulations to require agencies: one, to include, in their Federal Register notice indicating submission of an information collection clearance package to OMB, an estimate of the average burden hours per response, and when seeking expedited OMB review, a copy of the collection of the information; and, two, to indicate on each collection of information or any related instructions the estimated average burden hours per response, together with a request that respondents direct to the agency and OMB any comments on the form itself and the accuracy of the burden estimate.

We have seen that most recently, I suspect—all of us—in the forms that we receive from the IRS, and we will all have an opportunity to comment on the burdens there.

The 1986 amendments also expanded agency information resources management responsibilities, and OMB's counterpart oversight role, to stress telecommunications, information technology, security of records, agency dissemination of information, and increased statistical policy and coordination functions.

The Congress also passed the Computer Security Act of 1987 and the Computer Matching and Privacy Protection Act of 1988, expanding and refining OMB's responsibility for assuring the integrity and privacy of Government information.

I have given this brief history to stress the basic continuity of OMB's paperwork and information oversight programs. OMB's paperwork review process has been in place for nearly 50 years. It has been long supported by the Congress and modified only slowly and after careful and deliberate consideration.

In Title II, S. 1742 appears to be taking this approach. It creates a "Commission on Federal Information" which is directed to consider issues relating to the substance and implementation of the Paperwork Reduction Act. S. 1742 would also amend section 3414 of the Act to have GAO recommend any "changes in law or administrative improvements necessary to better achieve the responsibilities assigned under law, including those related to both the Office of Information and Regulatory Affairs and the agencies."

We support this approach. Many of the changes in the Paperwork Reduction Act of 1980 made to the Federal Reports Act of 1942 were supported by the 1977 recommendations from the Commission on Federal Paperwork. Many of the issues raised by agency and OMB implementation of the Paperwork Reduction Act are complex and interrelated, and would all benefit from being studied by such a commission and GAO.

I would point out, however, that Title I of S. 1742 appears to offer answers to the questions to which the Commission is asked to respond, thus prejudging the Commission's response to the issues that Title II asks it to consider.

We would suggest that the Committee consider converting the detailed provisions in S. 1742 involving the collection and management of statistical and other information into more general statements of information resources management policies, and that the Commission withhold any detailed statutory changes in these areas until the Congress has had an opportunity to consider the Commission's and GAO's recommendations.

I also note that S. 1742 would have the Commission issue its final report and recommendations in less than 18 months. This seems a little fast. After Congress creates this Commission, the Congress will still have to appropriate funding, the President will have to appoint commissioners, and the Commission, in turn, will have to select and hire staff, and then conduct research and public hearings to evaluate the many complex and interrelated issues involved.

As with the original Commission on Federal Paperwork, this would likely take at least 3 years after creation of the Commission rather than the less-than-18 months now provided in S. 1742.

Extending OIRA's reauthorization to 4 years would allow the Congress, in the context of OIRA's next reauthorization, to consider in an orderly way the Commission's and GAO's recommendations and their impact on agencies' and OMB paperwork clearance and information resource management programs.

I would also like to note that in at least some ways S. 1742's proposed changes to OMB's long-established information collection and review process would run counter to the purposes and structure of the original Federal Reports Act of 1942 and its 1980 and 1986 amendments.

For example, despite the general agreement within the Congress and the Administration that the agencies and OMB need to do more to reduce unjustified paperwork burdens on the American public, S. 1742 would virtually eliminate the independent review of ongoing paperwork that Congress viewed in 1980 as essential to reducing unjustified paperwork burden. It does so primarily by adopting new and burdensome review procedures and by establishing a new standard for OMB to apply—and for the courts to review—in deciding whether to have an agency improve the quality or reduce the burden of existing information collection. This "arbitrary and capricious" standard appears to drop or supersede the long-established Paperwork Reduction Act principles based on need, practical utility, and burden.

Both in 1980 and in 1986, Congress stressed the importance of reducing the burden of the Federal paperwork inventory by defined percentages. Likewise, S. 1742 would direct OIRA to target a 5 percent burden reduction from existing information collections, particularly from the burdens imposed by Federal procurement and grant programs.

Working with the agencies, we have, since 1980, achieved a substantial reduction in paperwork burden—in rough terms, a reduction of over 600 million hours in annual reporting to the Federal Government. But Federal paperwork burden today is way up from what it was in 1980, as we have heard before, by over, in our estimate, 470 million burden hours. Once new collections or agency programs create new information collections, their respondent burdens become part of the existing paperwork inventory. Only through constant agency reevaluation and OMB review of what is in the existing paperwork inventory can we reduce ongoing paperwork burdens on the public.

This is why President Carter's Executive Order 12174 of November 30, 1979, established a sunset review at OMB for both new and ongoing information requirements, a principle codified in the Paperwork Reduction Act of 1980. S. 1742 would undermine this long-established independent sunset review. While the bill stresses the need to share and disseminate information, it seems anomalous for it to limit effective Executive oversight to improve the quality and reduce the burden of that same information.

Mr. Chairman, under the Paperwork Reduction Act, agencies and OMB, working together, have improved the quality of information collected by the Federal Government and reduced unnecessary burden on the public. Over 90 percent of the burden of the paperwork imposed on the public today involves regulatory, procurement, grant, and tax reporting. The public continues to find Federal paperwork requirements overwhelming. For example, in 1987 OMB had to act strongly to simplify the IRS W-4 form, the Employees' Withholding Allowance Certificate. Many complained that the W-4, which doubled in size from two to four pages, was much too complex. OIRA worked with IRS to develop a simplified 2-page W-4A, much to the relief of many workers and, I would say, many businesses.

In a recent report, GAO described how, as part of their assessment of the technical adequacy of OMB reviews, GAO had selected 17 case examples for an independent review by three national experts. In essence, GAO asked these individuals whether, based on the technical adequacy of the agency proposal, they would have approved or disapproved the agency request. And the GAO then compared the decisions of the experts with OMB's decisions on these 17 items. The results of the comparison are as follows:

For the seven cases that OMB disapproved, the experts would have disapproved three and approved four. For the 10 cases that OMB approved, the experts would have approved three and disapproved seven.

The GAO report notes that three of the four cases OMB had disapproved were resubmitted and ultimately approved, resulting in actual disagreement with the experts involving an OMB disapproval in only one case.

On the other hand, the experts would have disapproved seven cases that OMB approved, implying, at least, that OMB should consider exercising its paperwork review authority more stringently than it does.

OMB strongly supports the authorization of appropriations for OIRA so that OMB may continue its ongoing work with agencies to improve their collection, use, and sharing of information, as provided in the Paperwork Reduction Act. We support the provisions of S. 1742 related to information dissemination, sharing, privacy, security, and records management, and the creation of the Commission on Federal Information.

We appreciate this opportunity to testify and request the opportunity to work with you to make S. 1742 a bill that can be signed into law.

Chairman GLENN. Thank you very much, Mr. MacRae.

Before we go to questions, we have Congressman Ted Weiss with us, who was unable to be here at the opening of the hearing.

Ted, if you would take the seat at the table, we would appreciate your testimony.

Mr. MacRae, please stay there because we will get to your questions as soon as Mr. Weiss is finished.

We welcome you Congressman Weiss. We know you have taken an active part in this over in the House, and we look forward to your testimony.

TESTIMONY OF HON. TED WEISS, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. WEISS. Thank you very much, Mr. Chairman. I very much appreciate your courtesy in providing me the opportunity to testify this morning and also for fitting me into what I know is a very difficult schedule for you today.

Let me start off by complimenting you and Senator Bingaman for the leadership which you have exercised on this very important issue.

I am going to ask your permission to summarize my statement and have the prepared statement entered into the record.[1]

Chairman GLENN. Without objection, your entire statement will be included in the record.

Mr. WEISS. I also would like to submit for your perusal a bill which I have introduced in the House.

Chairman GLENN. Thank you.

Mr. WEISS. I think that the subject that you are discussing and that you are considering is really one of the more serious abuses in Government; that is, the overzealous regulatory review activities in OMB's Office of Information and Regulatory Affairs.

I think that Senator Bingaman's legislation really moves in exactly the right direction because he recognizes the problem which brings us all here today, which is the need for a strong regulatory review provision in the legislation that will be finally adopted.

The House Subcommittee which I have the privilege to chair has documented numerous instances where OMB has interfered with the decisionmaking process in areas such as food safety, the drug approval process, food labeling, and workplace safety.

My subcommittee is not alone in revealing OMB's tampering with the regulatory process. The list of cases of OMB meddling can be obtained from a variety of committees and subcommittees in the House and the Senate. Congress has passed health and safety laws and delegated implementation of those laws only to the specific agencies with expertise in the relevant subject matter.

OMB has no statutory right to alter the decisions of the agencies empowered by Congress to protect the public's health. In my view, OMB's so-called regulatory review activities over the last 8 or 9 years are almost certainly illegal.

Perhaps the most troubling aspect of OMB's review of regulations is the manner in which it takes place. Behind closed doors, nameless and faceless OMB employees—using the powers granted to them not by statute, but by Executive Order—have forced expert agencies like the Food and Drug Administration to alter regulations. Often, these orders are issued over the telephone, with no documentation of the communication.

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[1] See p. 338.

Let me briefly describe a few cases of OMB interference that my subcommittee has uncovered.

The first one involves the regulation of color additives. In 1982, FDA was prepared to ban six different color additives because agency scientists determined that the additives caused cancer in animals. Under a provision of the Food, Drug, and Cosmetic Act, known as the Delaney clause, carcinogenic additives must be banned.

At the urging of color additive manufacturers, OMB held numerous meetings with officials of FDA and the Department of Health and Human Services in an attempt to prevent some or all of the dyes from being banned.

In the report that was unanimously approved by our full Committee, we found that, "OMB's efforts to influence the Department's regulations of color additives found to be animal carcinogens interfered with scientific, public health decisions that Congress expected the Department and its experts to make."

The second case concerns the alteration of a proposed regulation designed to ease restrictions on the use and sale of experimental drugs. In the 1987 hearing, our subcommittee revealed that at OMB's insistence, the proposed standard of approval for experimental drugs to treat life-threatening illnesses was drastically altered. Prior to OMB's involvement, FDA proposed that drug sponsors bore the burden of demonstrating that a drug's benefits outweighed its risks, and that sufficient evidence of safety and efficacy existed.

However, OMB ordered that FDA's proposed standard be changed. A new proposal removed the language requiring sufficient evidence of safety and efficacy. Instead, OMB placed the burden on FDA to prove that the risks posed by a drug were "unreasonable" before the agency could reject an application.

This case was all the more troubling because there was no documentation to identify which OMB employees were responsible for rejecting an FDA proposal that sufficient evidence of a drug's safety and efficacy be required as a condition for approving an experimental drug. OMB was simply acting in the dark.

The last example that I have involves video display terminals. In 1982, the National Institute of Occupational Safety and Health (NIOSH) started planning a study of the possible hazards of video display terminals on pregnant women, in response to reports of birth defects, miscarriages, stillbirths, and other reproductive problems. In 1985, the study design was completed, but OMB refused to approve it.

OMB had no scientific staff to review the proposed study, so its criticisms were based, in large part, on reviews conducted by two industry consultants. In June 1986, OMB approved the study, under the condition that NIOSH delete 69 questions about stress at work and fertility. This represented approximately one-third of the study.

Scientists at NIOSH and the Office of Technology Assessment stated that the revisions would seriously weaken the study. Nevertheless, OMB insisted that its revisions be incorporated. In so doing, OMB ignored the recommendations in our report and numerous other objections to the OMB revisions.

In 1988, California researchers reported that VDT's may be causing miscarriages and birth defects. Based on that study, experts have estimated that VDT's may cause 100,000 miscarriages each year. More research is needed to confirm these conclusions. The NIOSH study is still not completed. Whatever the results of the NIOSH study, it will be extremely difficult to draw any conclusions because of the deletions from that study.

Another result of OMB's interference is the need to virtually redo the original NIOSH study. So, the Federal Government is now funding yet another VDT study which is being conducted by Mt. Sinai Medical Center in New York.

While reasonable persons may disagree over the proper scope of regulatory review, I hope we can all agree that our system of open, participatory democracy demands that the public be provided access to the record of OMB's role in regulatory decisionmaking. The Administrative Procedure Act and fundamental principles of constitutional laws demand as much.

On September 19, 1989, I introduced H.R. 3314, the "Regulatory Influence Reporting Amendments of 1989." The goal of my bill is to assure that OMB can be held more accountable for its substantive activities.

I understand that the regulatory review provision in Senator Bingaman's legislation differs from my bill. The important point, however, is that both bills stand for the proposition that the Congress must address this matter by enacting a statutory change that imposes binding legal obligations on OMB.

I would like to respectfully suggest two amendments to S. 1742 that your Committee might want to consider:

First, I think it is important that OMB be required to make written memoranda of any oral communications related to a review of a regulation, and that those memoranda be publicly available.

Second, there should be a specified time period in which OMB must place written materials in the public file.

Under your leadership, Mr. Chairman, I am confident that the Congress will enact legislation that goes a long way toward making OMB answerable to the American people.

Again, I thank you for your courtesy in taking my testimony.

Chairman GLENN. Thank you, Congressmen Weiss, very much.

I was just handed a note that is of interest to our hearing this morning and to our witnesses. The Supreme Court just handed down a decision—7 to 2 was the vote with Justice Brennan writing the opinion on it—on the so-called hazardous communication case that has been before the Court for some time.

The Court ruled that OMB does not have the authority to review third-party disclosures. The AFL–CIO had brought the suit, I believe. This is the decision on that case.

The Supreme Court decision has been awaited for some time, and it was just handed down this morning, just a few minutes ago, as I understand it.

I have no questions, Congressman Weiss.

Senator Bingaman, do you have any questions?

Senator BINGAMAN. I do not. I appreciate his leadership on this on the House side, and we appreciate his good testimony.

Chairman GLENN. Congressman Weiss, we look forward to working with you there. Thank you.

Mr. WEISS. Thank you very, very much.

Chairman GLENN. Thank you very much. We appreciate your suggestions this morning.

Mr. MacRae, we will get back to questions.

As I understand it, the House Government Operations Committee has negotiated an administrative agreement with you on regulatory review procedures. I don't quite see how that will take care of the long-term resolution of the problems. Enforceability of the agreement can go up and down, depending on who happens to be in the White House or in OMB.

How will that agreement provide a long-term resolution to the alleged problems of delay and accountability at OIRA?

Mr. MACRAE. Well, the House agreement basically builds on an earlier agreement, the so-called Gramm memo, of 1986. We have had in place for some time instructions to the agencies as to how we will conduct ourselves with regard to regulatory review.

Obviously one could argue that Administrations change, people could change their mind. I think the point we are trying to make here is that, while clearly putting that in statutory form gives us very strong constitutional problems—and the Justice letter I think addresses that rather directly, as does Director Darman's letter—we want to show that we are willing to work with the Congress in a constructive fashion.

I think that from the fact that the reauthorization—whether it is four years or two years or whatever—will come up repeatedly, Congress will have the opportunity to review OMB's behavior to determine if we have acted in a responsible fashion. And I think that that is a proper way to proceed.

Chairman GLENN. Our problem with it is that it can be changed by a new Administration or changed overnight if you have new people coming in.

Incidentally, we are on a 5-minute rule here, as we usually are in this Committee, so we have a chance to really bat things around a little bit. Before my time runs out, do you have any comment on the Supreme Court decision?

Mr. MACRAE. Well, I think that the ball has been passed back to the Congress. We felt—the Justice Department felt, Senator Chiles felt—very strongly that both in the 1980 enactments and in the 1986 amendments it was made very clear that Congress was conveying, conferring authority on OMB to review paperwork, including the review of paperwork between third parties. Senator Chiles' brief made that point. We made that point. We thought that is what the Congress intended. Obviously we are going to have to go back and review that, in light of the decision.

Chairman GLENN. To date, most of the focus on paperwork review has been on reducing the costs of collecting information. Do you feel that OIRA should do more to maximize the net benefits of information collection as a part of its paperwork review practices?

Mr. MACRAE. Well, I would hope we were doing that, sir. We could probably do more.

Paperwork is not all burden; it may be a burden to some people, but there are obvious social benefits and other benefits conferred. One of the ways we are going to be able to get a better assessment of the net benefit is to better assess what is the actual burden.

We have beliefs—all of us have very strong beliefs—as to what the benefits are in requiring paperwork to give us a better fix on what's going on in occupational health and safety areas, other areas. But we also need to be able to better assess the burden.

One of the things we did, following the 1986 enactment, was require that agencies put their estimate of the burden on the form that they were asking the public to fill out. I mentioned the fact that we have all seen our IRS forms and for the first time you will see that the burden estimate by the IRS, now that it has to go public, is much higher than before. It's an increase of about five- to six-fold.

Once we have a better fix on the real burden, it seems to me we can then balance the benefits against that burden.

And I see my light is on.

Chairman GLENN. That's all right. That's the warning light. You have 1 more minute left. [Laughter.]

Mr. MACRAE. So the answer is: Yes, I agree we can do more, and I hope we will have better feedback from the public as to what they perceive the burden to be, and the benefit.

Chairman GLENN. Yes. Let me ask, before my time runs out too, is the Paperwork Reduction Act working? Because it doesn't appear to be very effective when both you and the GAO agree that paperwork has increased and not decreased in spite of all the efforts, legislation, sidebar agreements and all the other things we talk about; paperwork is going up and not down.

Mr. MACRAE. Well, part of that is, sir, I guess, the fact that we have had a lot of new legislative enactments. A large part of it is.

Chairman GLENN. Is the increase due to congressional action that you have to respond to? Or is it the other way around? Are agencies just going out with more and more requests for information?

Mr. MACRAE. I think, in large part, that agencies are therefore required to implement new congressional enactments.

Chairman GLENN. I thought you might say that. [Laughter.]

Mr. MACRAE. But agencies also, to some extent, are at fault.

Chairman GLENN. Yes.

Mr. MACRAE. And also I would say, based on certainly the GAO report and others, that we have to be more vigorous in our reviews at OMB.

But I think there is one thing that we can say categorically: If you ask the small businessmen out there, if you ask the State and local governments and if you ask not the big guys but the average Joe, has there been some reduction in some areas, I think the answer will be "yes." Six hundred million hours that otherwise would have been imposed have been removed.

Chairman GLENN. OK. My time is up.

Senator Bingaman?

Senator BINGAMAN. Thank you, Mr. Chairman.

One of the things that has been cited by Mr. Darman and you in your testimony as a major problem or major concern is this issue of requiring a line item budget submission for OIRA.

Now, hasn't Congress been giving you a line item when they give you the budget?

Mr. MacRae. We are included in the OMB appropriation, sir.

Senator Bingaman. But it is not specified how much goes to OIRA?

Mr. MacRae. There is an amount specified that goes to OIRA for implementation of the Paperwork Reduction Act within the OMB appropriation.

Senator Bingaman. Right. So you don't object to Congress specifying how much goes to OIRA, you just object to it not being included or considered along with OMB's overall funding?

Mr. MacRae. We are requesting that we remain within the OMB appropriation.

Senator Bingaman. Yes.

Mr. MacRae. The actual appropriation specifies how much goes to OIRA for carrying out the Paperwork Reduction Act.

Senator Bingaman. It seems to me that giving you a separate line item would give OIRA the opportunity to make a case for adequate funding for the things that you are responsible for. Our concern here, my concern all through this, has been that you have a tremendous number of responsibilities, many of which are not being adequately handled and possibly one of the reasons is that you haven't been able to get the necessary funds to do them.

Giving you a line item in the budget would help to do that. But you don't see it that way?

Mr. MacRae. Well, coming from OMB and having been there a long time, it is obviously an awkward position to be in to ever ask for an increase of anything.

But I think that we have received adequate funding. The amount that shall go to OIRA for carrying out the Paperwork Reduction Act is specified within that appropriation. I think our remaining within the OMB appropriation has worked well.

We have a staff of about 65 people. We were larger before. We had up to 80 people. But I like to think that we do more with less. And obviously I wouldn't want to fall much below that number.

Senator Bingaman. Well, one of my concerns that prompted this is that there are some other functions which you also are directed in the law to carry out, such as oversight of statistical information gathering. I think you have five people who work at that; right?

Mr. MacRae. That's correct, sir.

Senator Bingaman. Do you think you are able to give that adequate attention?

Mr. MacRae. I think in conjunction with the support we receive from the agencies—one of the things the Paperwork Act provides is that we can draw on other agency resources—that we have been able to do an adequate job. We can do more even with the people we have, and we will be doing more.

Senator Bingaman. Well, I think there was testimony at our hearings last summer that there was going to be an effort to shift some resources into that area. Has that happened?

Mr. MacRae. I am urging my colleagues in that area to come forward with people they would like to hire, yes sir.

Senator Bingaman. Earlier you were talking about the measurment of benefits and the burdens during the information collection review process. We thought we were trying to get at that same issue in our legislation.

And then I read the attachment to Mr. Darman's letter where he is specifying the various things that are objectionable, and one of the things that is objectionable is the addition of the word "benefit" to the statute when talking about information.

He says that that is objectionable. They want to delete this word. The word is functionally duplicative with "need for," which is already in the notice, because agencies in explaining their "need for" information will necessarily explain the "benefit" to the agency and private users to be obtained from receiving that information.

It says, "Thus, the use of the word 'benefit' would fragment the concept of utility in a confusing way without adding to conceptual clarity."

Could you explain that to me? [Laughter.]

Mr. MacRae. I guess what we were basically trying to say is the benefit is largely defined by the agency. And it should be.

Senator Bingaman. But what is wrong with Congress using the word benefit in the statute? I mean you used it in your testimony, and it seems to be a major part of your responsibility and the agency's responsibility is to balance the benefit and the burden.

Mr. MacRae. Sure. There are cases where "need for" may not have anything to do with benefit.

Senator Bingaman. Right.

Mr. MacRae. So I see that benefit is really a subset of the expression "need for." An agency may say, "you know, we have an enactment, we've got to collect this information, that's it." In the agency's own judgment, there may not be any benefit of that, but they've got to follow the law.

Senator Bingaman. We are not dropping out "need for."

Mr. MacRae. Yes, sir.

Senator Bingaman. We are leaving that in.

Mr. MacRae. Well, I am simply saying that I think the word "benefit" is subsumed in "need for."

Senator Bingaman. So that is a major problem you have with the bill?

Mr. MacRae. Well, it is a problem only in that I think it may focus away from just the bigger question of the "need for" it. The agency basically makes the justification.

Senator Bingaman. My time is up, Mr. Chairman.

Chairman Glenn. Mr. MacRae, we have had the latest examples of OMB abuse of its review authority under the PRA, whereby regulatory activity of agencies has been curtailed or hampered. Many of these seem to be in the area of health and safety: OSHA, NIOSH, and so on.

The charge has been made that OMB has played politics: where OMB has disagreed with a certain congressional requirement their authority has been used to send back requests for information, to require a restatement of them, to delay and, in effect, to thwart the will of the Congress by pushing these things back to the agencies because of disagreement on policy.

What is your response to that?

Mr. MACRAE. Mr. Chairman, I would like to submit for the record—I don't have it with me—a statement that we provided to the House with regard to a number of these allegations. And I would like to be able to submit that for the record.

Chairman GLENN. Fine. That will be included as part of our record.

But I would like to hear your response today also.

Mr. MACRAE. But in response to the question you pose, I would urge that the Committee might wish to call the political levels at these agencies where the allegations have been made that OMB has interfered with their rulemaking or their attempts to collect information. The reason is that the political level is ultimately responsible in those agencies for carrying out the laws of the Congress. And I think you might get a different reaction.

I also would urge that perhaps the Committee would inquire of some of the agency clearance officers with regard to paperwork—the clearance officers who coordinate the agencies' requests and provide them to us—whether they think we have been acting in an improper fashion. I think you might get a different impression.

And I think, as our document will show, that we have acted in a proper fashion. I am a career employee. I have been there a long time under different Presidents—Republicans and Democrats. I have never been given instructions of an ideological or partisan nature. And if I were, I would quit.

Chairman GLENN. Executive Orders 12291 and 12498 appear to have created a two-tiered regulatory process. There's one for agencies pursuant to their statutory missions and quite another for OMB pursuant to a political standard, which is along the same lines as my questioning to you. Isn't that an inconsistency?

Mr. MACRAE. I don't understand the reference to the political standard.

Chairman GLENN. I'm sorry?

Mr. MACRAE. The reference to the political standard?

Chairman GLENN. Yes.

Mr. MACRAE. You mean the cost-benefit?

Chairman GLENN. Well, the agencies have their statutory missions, and under the Executive Order, OMB pursues a political standard.

Mr. MACRAE. Oh. I guess that is in reference to Executive Order 12498.

Chairman GLENN. Yes.

Mr. MACRAE. We always thought that the requirement of the Executive Order for agencies to come forward with their regulatory programs and to lay before the Congress and the public what they intended to do in the forthcoming year with regard to regulation was a good-Government proposal. If that is political, then we stand guilty.

But the whole intent of the Executive Order, as I think a reading of it will show, was that this is an attempt to get the cards on the table.

Chairman GLENN. The Chairman of the Federal Trade Commission has written me a letter on behalf of the Commission, which I quote in part. It says:

> Only modest opportunities remain for further reductions in paperwork burdens. Accordingly, additional burden reduction goals based on a percentage of existing activities do not appear realistic. Any significant percentage reduction in the burden now attributed to the Federal Trade Commission would require the elimination of disclosure requirements that are either required by law or are serving an appropriate function in the marketplace.

Can you comment on this, particularly in light of S. 1742's goal of reducing paperwork burdens by 5 percent annually?

Mr. MACRAE. We have always assumed that 5 percent across the board would not necessarily mean that any one agency would have to achieve 5 percent—some agencies maybe less, and maybe other agencies would achieve a lot more. I would say clearly in the case of the FTC and certain other agencies, they have cut about as much as they reasonably can.

Chairman GLENN. As I understand it, the "regulatory Program of the United States", is supposed to be published every September by OIRA. Now, this is required by Executive Order 12498.

Was the 1990 Program published last September?

Mr. MACRAE. No, it was not. And the reason was that the new Administration appointees were barely in the saddle at the time and had not had a chance to review the agency submissions, and it was therefore decided that it would be put off for that year.

Chairman GLENN. Well, that is one of our problems, where something is not in statute and is authorized by Executive Order, it's easy for the President to ignore it. How can Congress be assured that the report will be forthcoming this year and in future years and not just in election years for example?

Mr. MACRAE. Well, I would say, sir, that I certainly feel comfortable that it will be published next year and thereafter. And I would hope that it would.

Chairman GLENN. Are you going to catch up by doing an early submission soon from last year, or do we wait until September to get it this year? [Laughter.]

Mr. MACRAE. I believe we published in August for 2 years.

Chairman GLENN. Are we just going to skip a year?

Mr. MACRAE. Well, as I say, interestingly enough, some people would say that given that Executive Order 12498 is an imposition by OMB it's great that it wasn't published at all. So I am glad to hear you say that you would like to see it get out. We would, too.

Chairman GLENN. We would like to see it so we can review it.

Mr. MACRAE. Surely.

Chairman GLENN. And we feel that that is something that should be put out every year. When we see Executive Orders being ignored, we can't enforce them. That's the reason we like to put things in statute up here so we know what's going to happen.

Mr. MACRAE. I understand, sir.

Chairman GLENN. My time is up.

Senator **BINGAMAN**. Regarding your comments on the undermining of the independent sunset review that you folks engage in. How many items come to you for that review each year?

Mr. **MACRAE**. This is off the top of my head, but I would imagine that most of our, say, two-thirds of the items that we get are recurring submissions.

Senator **BINGAMAN**. And how many, roughly? Could you give us an estimate as to how extensive that is, how much of your time is spent in reviewing recurring submissions?

Mr. **MACRAE**. Well-established, well-understood recurring submissions, probably don't get as much time as ones coming up for their first repeat.

Senator **BINGAMAN**. What we have done in the legislation, as I am sure you are aware, is we tried to retain a sunset provision but essentially delegate it to the agencies and have them self-certify and then give you authority within 30 days of the expiration of their control number, so that you would be able to go ahead and overrule them or step in and object or whatever you want to do.

That seemed to make sense to us from the point of view of practicality. Do you really have the people and time and all to do a meaningful in-house review of each of these things every year or so?

Mr. **MACRAE**. Well, one of the things that is going to help us, Senator, is that we expect to begin, and we are beginning, to see comments from the public because of the publication of the burden now on the forms. So we are getting responses. And of course, the most vocal one was the IRS Form W-4.

The problem we really have with S. 1742 is the very high standard we have to meet in order, if you will, to march back in and challenge the agency; and that is, the "arbitrary and capricious" standard that is set forth in S. 1742. We think that is too high.

Senator **BINGAMAN**. So you think a different standard that would give you more discretion would certainly ease some of your concerns?

Mr. **MACRAE**. Yes. I am not saying, and I don't think any agency has ever recorded, that we didn't have a basis, a legitimate basis based on complaints from the public, that when we challenged them at the renewal time that they didn't take it into account. That isn't to say that we challenge very often. Our overall disapproval rate for all paperwork is only 3 percent, less than 3 percent.

Senator **BINGAMAN**. But a different standard, you think, might solve your concerns in that area?

Mr. **MACRAE**. I think it would help a lot, yes, sir.

Senator **BINGAMAN**. In the informal administrative agreement you have with some Members of the House, I guess by definition the provisions in there on ex parte communications, safeguards against delay, and disclosure requirements, are all acceptable to you, it's just that you don't want it in statute?

Mr. **MACRAE**. Well, I would say, first of all, that the principal change from the 1986 procedures, and we certainly recognize that there is legitimate concern, has to do with the question of delay.

One of the things we have striven to do over the last couple of years is to really work off any backlog of regulations that are over with us. And I think now the oldest draft regulation we have maybe is only 7 or 8 months old. That may sound like a long time, but it's very complicated, some of the regulations. But most of them we act on nowadays within 30 to 45 days. So I think that is important.

There are some discussions ongoing. The House agreement we are still discussing. It is a framework.

Senator **Bingaman**. Do you have any agreement on the delay, or the length of time that you can delay things?

Mr. **MacRae**. Yes. I think we basically recognize that we need to express our views certainly within 60 days.

Senator **Bingaman**. Sixty days?

Mr. **MacRae**. Yes.

Senator **Bingaman**. Is that for major regulations or is that for anything you think you should address?

Mr. **MacRae**. Probably we should be able to do that for everything. But within 60 days. On the other hand it is important to have another delay—delay is a bad choice of words—another 30 days in extraordinary cases.

Senator **Bingaman**. Okay. So 60 days with the possibility of extending it another 30 where it is an extraordinary circumstance?

Mr. **MacRae**. Yes. And administratively I am trying to get to that point anyway.

Senator **Bingaman**. Right.

My time is up, Mr. Chairman.

Chairman **Glenn**. Mr. MacRae, you have indicated you have worked over at OMB for many years. You are a career person over there. Let me take your memory back into the Reagan years. Did you ever witness any OMB activity that was partisan or political? You indicated there was none.

Mr. **MacRae**. No, I have not, sir.

Chairman **Glenn**. Did you read David Stockman's book?

Mr. **MacRae**. I only read excerpts of it.

Chairman **Glenn**. Excuse me?

Mr. **MacRae**. I only read excerpts. I did not read the entire book.

Chairman **Glenn**. Well, he makes a pretty good case in there, which nobody has refuted as far as I know, that there was phony data generated at OMB to support supply-side economics and that it was done for political purposes to sell a program.

You didn't see any of that over there?

Mr. **MacRae**. Well, at that time I was on the budget side, and I was the branch chief for the Treasury and GSA, and there weren't any data to cook there. I mean the deficit was whatever it was.

Chairman **Glenn**. You never heard any rumors going around that there was skullduggery afoot over there on the supply-side economics figures?

Mr. **MacRae**. No, I did not. Regarding the statements that were subsequently made by Mr. Stockman, obviously he believes that to be the case. I don't.

Chairman **Glenn**. He directed it.

Mr. **MacRae**. If this was the case.

Chairman **Glenn**. That's what he said. He says so in his book.

Mr. **MacRae**. But I don't necessarily believe that if that were the case that OMB staff were involved in that.

Chairman GLENN. Well, I don't know where he was getting his figures. He was getting them from OMB-generated figures, if I understand his book correctly.

Mr. MACRAE. I have never known anybody to ask for us to phony up figures. I have never heard of us being asked to phony up figures.

Chairman GLENN. Well, it has been some time since I went through his book, and I didn't read it in preparation for this morning.

Mr. MACRAE. I am not saying that once figures were provided, where we provided our best guess, that they may not have been manipulated. And that is always the possibility.

Chairman GLENN. Figures don't lie, but liars figure. [Laughter.]

Okay. I don't have any more questions.

Senator BINGAMAN. Well, Mr. Chairman, we have a report dated February 21 which was prepared by the Library of Congress, the American Law Division and Mr. Morton Rosenberg on the issue of the constitutionality questions that the Administration raised on this proposed legislation.

I would like to include it in the record if we could.[1]

Chairman GLENN. Without objection, so ordered.

Thank you, Mr. MacRae.

Mr. MACRAE. Thank you, Mr. Chairman.

Chairman GLENN. We appreciate it. We may have other questions that other Committee members may wish to submit to you, and we would appreciate a response so that it could be included in the record.

Mr. MACRAE. Will do, sir.

Chairman GLENN. Good.

Our next witness is Milton J. Socolar, Special Assistant to the Comptroller General, General Accounting Office.

Mr. Socolar, welcome to our hearing this morning. We look forward to your statement.

TESTIMONY OF MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY ELEANOR CHELIMSKY, ASSISTANT COMPTROLLER GENERAL, PROGRAM EVALUATION AND METHODOLOGY DIVISION, AND JACK BROCK, DIRECTOR, GOVERNMENT INFORMATION AND FINANCING MANAGEMENT, INFORMATION MANAGEMENT AND TECHNOLOGY DIVISION

Mr. SOCOLAR. Good morning, Mr. Chairman.

I would first like to introduce my colleagues. On my left is our Assistant Comptroller General, Eleanor Chelimsky, who heads our Program Evaluation and Methodology Division. And on my right is Jack Brock, our Director of Government Information and Financial Management, for the work done by our Information Management and Technology Division.

We are pleased to be here to discuss S. 1742, titled the Federal Information Resources Management Act of 1989. I will just briefly summarize my prepared statement, which I would ask to have introduced into the record.[1]

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[1] See p. 640.

Chairman GLENN. Your entire statement will be included in the record.

Mr. SOCOLAR. S. 1742 basically reauthorizes the Paperwork Reduction Act of 1980 and is designed essentially to achieve efficient collection and use of information by the Government, and it also seeks to improve the Government's statistical and other information databases and provide for better access to that information by the public.

We support the thrust of the bill to reduce the burden of Federal paperwork and to change the way information is managed in the Government.

With regard to the management of information in the Government, you might say that Federal agencies are in somewhat of a state of crisis. We spend about $20 billion a year on information technology.

GAO has reviewed the development and implementation of a number of large data systems, and we have yet to find a system, a large system, that has met what we think are three pretty important criteria: We have not found any large system that has come in on time; that has been reasonably close to the estimates that were used to justify the project in the first instance; and perhaps most important of all, that fully satisfied the needs of users for whom the systems were designed.

We tried to get a handle on finding out what some of the underlying, fundamental reasons were for the current state of affairs. And in October of 1989 we organized a symposium at which we listened to members of the private sector who have been highly successful at putting together huge data systems that are comparable to the kinds that we use in the Government.

We had panels where personnel from the Legislative and the Executive Branch had an opportunity to discuss these issues. We listened to Members of Congress. And the symposium concluded with several key, fundamental aspects of bringing these kinds of systems on line that are largely not adhered to in Government systems.

As a matter of fact, we are releasing a report on that symposium today.

Some of these key attributes of successful systems are:

First, that there has to be full interest and commitment at the very top levels of an organization, together with a long-term continuity of project managers. They all, all of the successful systems, proceed under well-developed plans, plans that provide a clear and flexible architecture against which various aspects of any of these projects can be measured;

They all involve large networks of experts, people intra and external to the organizations involved who can provide advice as these projects go along;

And also, very important is that each of these projects has proceeded with service to the customer as one of the primary aspects that the projects are directed toward.

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[1] See p. 347.

For example, in the Social Security Administration, the emphasis would really be on what it is that a person coming to the Social Security Administration for assistance would need that would drive and direct how the information management system in the agency should be developed. It is not so much designing a system to automate what is presently being done, but rather to use the technology to do business in a better and more efficient way.

Now, the bill, it seems to me, recognizes some of these aspects. The provision of a qualified information resource management official at each agency certainly should help. But I think here too we have to remember that the success of that individual is going to be highly dependent on how much support and interest and attention he can get from other top agency officials.

Program managers today must be capable of understanding and managing information resources and must be able to assist in developing those resources toward more efficient delivery of program services.

Turning now to OIRA, in the reviews that we have made of OIRA operations, we focused on the proper balance between minimizing burden on the public while seeking the best quality of information. We found that burden has remained essentially stable and perhaps with some increase.

We did find problems with the quality of information being collected by agencies and the timeliness of OIRA's clearance process.

What we found is that, very often, information is being collected and the usefulness of that information is diminished in many cases because either proper information is not being collected or the information that is being collected isn't properly arrayed in the requests that underlie those information collection activities.

Reviews were slower than in earlier years. There was a large increase in the number of reviews exceeding the legally authorized time limits, and some OMB-approved requests, as I said, were technically flawed.

Finally, review policies were inconsistently applied.

But we concluded that there were changes in OMB's procedures that could lead to notable improvement in information quality.

We support the creation of a commission provided by the bill, which is designed to study the gathering, processing, analysis, and dissemination of information by the Federal Government.

We feel the commission's role should be expanded to include examining how well agencies use information internally to manage or to achieve their mission objectives. At the same time, we would have to recognize that the tasks already laid out for the commission are so broad that we don't think that they could be accomplished in a meaningful way by July 1991. We would suggest a later reporting date.

Finally, I would just make mention of the provision in the bill that calls for a GAO study. We would, in GAO, prefer not to have such a study mandated by the statute. We have already limited resources in the agency and, by mandating such a study into statute, we think that we might well not be able to do what is really required in the most efficient way that would be possible.

We would much prefer to work with the Committee to get at problems that are identified, to have a series of studies, and provide for periodic hearings that we think would serve the Congress better.

We have not done very much work in this area in the relatively recent past. However, we have opened a new issue area, recognizing the importance of the area, and in the immediate future will be doing much more work that would support this Committee and the Congress.

With that, I can stop here and would be happy to respond to any questions that you have.

Chairman GLENN. Thank you very much.

I am curious as to your opinion on how accurate our figures are on whether we are making progress or not. You had a GAO report of last summer, June 14, that indicated that the figures for 1988 for projected burden of paperwork was going to be about 1.8 billion hours.

BCORP, who I mentioned in my opening statement—I believe you were here—indicates 8.3 billion hours, if my memory serves me. And, BCORP estimates that there is some $330 billion in cost, which is about 6.3 percent of our GNP, involved in paperwork reporting to the Government.

Is that a valid figure?

Mr. SOCOLAR. Well, I would like to have Ms. Chelimsky respond to that.

Chairman GLENN. She is the one that was assigned to produce last summer's GAO report? [Laughter.]

Mr. SOCOLAR. I think these figures obviously are not figures that are subject to a great deal of precision in the first instance.

Chairman GLENN. I know, but 1.8 to 8.3 is a considerable difference.

Ms. CHELIMSKY. Yes. It's sort of like the range they used to give for illegal aliens: somewhere between 1 million and 12 million.

Chairman GLENN. Yes.

Ms. CHELIMSKY. But the issue here is that very often you have accounting changes that have occurred. For example, we found that, in some cases, data collections that had been ongoing before the period where a change was supposed to have occurred suddenly entered into the counting of all the burden but had not figured in that counting earlier.

They were not new data collections. The data collections were there. We are not talking about new burdens. But simply by changing the fact that they were included or not included, the burden zoomed. And that was what we found.

If you look at our report, sir, you will see that we give 258 million burden hours by which the burden was supposed to have been decreased, and in fact we came out after we had calculated the changes in accounting that had taken place, we came up with an increase of 116 million hours, which is a lot less than others have said.

Chairman GLENN. Well do you think BCORP is just off on how they figure this? Are they including some things you don't include?

Ms. CHELIMSKY. I think a lot of that is highly inflatable, you know. You can suggest that, "We think that the burden is this." You have certainly seen questionnaires that say, "We think this is going to take you 3 hours to do," and it takes you 6 hours. And you also see the contrary. So they are sort of subjective figures, in many cases.

But what we found was, very simply, that things were being added in that should not have been added in. They were simply paper changes.

Chairman GLENN. Well, are trends up or down?

Ms. CHELIMSKY. They're up, but not as much as people say. We found an increase, finally, after subtracting and adding endlessly, of 116 million burden hours.

Chairman GLENN. Have you made an estimate of this as a percentage of GNP on your figures?

Ms. CHELIMSKY. No.

Chairman GLENN. Because BCORP's figure is 6.3 percent of GNP just in paperwork. Is that possible?

Mr. SOCOLAR. It sounds high.

Ms. CHELIMSKY. We haven't looked at this.

Mr. SOCOLAR. But I would not have any basis for either questioning it or suggesting it is accurate.

Chairman GLENN. But if you just took your figure of 1.8 billion hours in the report of last summer, that would still make it 1.75 or 2 percent of GNP just on filling out papers. Is that right?

Ms. CHELIMSKY. But those are burden hours that we're talking about. I don't know how they were costed out, so I don't know how you would say that they were a percent or not a percent of GNP. It depends on whose burden you're talking about. You can't just cost everybody's burden equally, I would assume. We didn't do it.

Chairman GLENN. Yes.

But if we just took their figures of $330 billion and 8.3 billion hours spent, that would come out to around $535 an hour. I guess they figure that with all the supporting structure, maybe that would be a valid figure. But that sounds very high.

Senator Bingaman.

Senator BINGAMAN. I have a question on the information resources management part of things. Let me just give you a little background first. There is an article in the paper today in the business section of the Washington Post, talking about a hearing on the House side with the Internal Revenue where they indicated that maybe $87 billion in back taxes and penalties and interest are owed.

Then it says, a little ways down here, "What emerged was a picture of an agency"—this is talking about the IRS—"that doesn't really know how much it's owed and whose information systems are so outmoded that it cannot identify problem areas or focus its resources."

Is it unrealistic to think that a central office somewhere in the Federal Government should have some responsibility for trying to help fix that; I mean, that OIRA, for example, should have a responsibility to try to help fix that kind of a problem when it exists in the IRS or anywhere else in the Federal Government?

Mr. SOCOLAR. I don't think that it is a job for OIRA. I do think that there needs to be some kind of central attention given to the Government's financial management systems. And that is what we are talking about, where agencies that have huge amounts of accounts receivable can't keep track of them, don't know what is owed to them, and are not able, for example, in the case of IRS, to get to them before statutes of limitation run out.

That is not a situation that is endemic to IRS.

Senator BINGAMAN. If there should be a central place where someone takes responsibility for trying to fix those problems throughout the Government, where should it be?

Mr. SOCOLAR. I think there needs to be a central officer in one of the central agencies, whether it be at Treasury or OMB, together with concomitant officers within the agencies themselves, who could work on a coordinated basis, lay out plans, and really move toward correcting what, in my view, is a rather deplorable situation right now.

Senator BINGAMAN. Yes, but I guess I would like to press you a little more there. I agree it would be great if we could all sit down and coordinate plans. But who should be accountable to the Congress and to the American people for fixing that kind of a problem?

Mr. SOCOLAR. I think each of the agencies need to be accountable. I think that ultimately it's the Executive Branch that is accountable to the Congress in connection with the way it is discharging its stewardship.

Senator BINGAMAN. So in your view, OIRA should not be in any way held accountable for those kinds of information resource management problems, or should not be expected to deal with them?

Mr. SOCOLAR. Well, I certainly don't think that it is a job that an organization with 66 staff members could handle. It is just far, far bigger than that.

Senator BINGAMAN. I guess I am still confused. You said an OMB official and a Treasury official should get together with a representative of the agency and coordinate plans?

Mr. SOCOLAR. Well, what I meant by that is that I think that it is important that a full structure be developed that would have the resources and the expertise and the qualifications of its staff to deal with what is really a huge problem.

Senator BINGAMAN. That is all I have, Mr. Chairman.

Chairman GLENN. Thank you very much.

We are going to have to move along. We have several other witnesses here. We would appreciate your response to any additional questions that are submitted.

Mr. SOCOLAR. Thank you very much, Mr. Chairman.

Chairman GLENN. Thank you very much.

Our next witnesses are Dr. Gary Bass, Executive Director of OMB Watch; and Sherry Ettleson, Staff Attorney, Public Citizen's Congress Watch. They are accompanied also by David Vladeck, Public Citizen Litigation Group.

Welcome to our hearing.

Dr. Bass, if you would lead off, please, we would appreciate it.

TESTIMONY OF GARY D. BASS, PH.D., EXECUTIVE DIRECTOR, OMB WATCH

Dr. BASS. Mr. Chairman, thank you. I will assume that my testimony will be submitted for the record, and I will proceed to summarize it.[1]

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[1] See p. 381.

Chairman GLENN. Fine. The entire statement will be included in the record.

Dr. BASS. I must say that listening to the witnesses this morning, I wanted to preface my comments, before reacting to the bill, with a very different vision than what Jim MacRae presented about OMB and OIRA's activities. I have the greatest respect for Jim MacRae as a civil servant and as the acting administrator of OIRA. But the picture he paints of one big, happy family in the Government just simply is not accurate.

OMB Watch spends a considerable portion of its time tracking the activities of OIRA. We spend time talking to agencies, to the information clearance officers to whom he made reference, and to agency regulatory officials. When we talk to these people, they complain about OIRA interference.

So we have followed up on Mr. MacRae's suggestion to talk to agency personnel. And his picture of one big, happy family really falls apart when you do talk to those agency people.

It was also with an enormous amount of skepticism that I listened to Mr. MacRae's use of examples. For example, he continues to cite the use of the W-4 form as a positive role OIRA played. Well, we should go back to that example. It was precisely OMB that approved it initially in its confusing state, and it required Congress to have a hearing on the W-4, and then OMB to reevaluate it again. And the point at which Congress and the Treasury worked out an agreement, OMB actually held the form up.

And Congress' concern was why is OMB involved here, when the Treasury and the Congress and the public, through the legislative debate process, have worked out agreements? So, I am quite surprised that he has used that as an example.

Also, I noted in OMB's statement a concern about the bill that says on page 6, "We are unaware of complaints concerning public access to OIRA's existing public files."

Well, for the record, I want to state I have a concern about access to the public record at OIRA. Not only is the Regulatory Program not being released, an example of a problem of not getting access to files, but there are many cases where we go to look at the files and actually documents are missing. They are not in there, they are not obtainable. In addition, there are a number of documents which we think should be obtainable which they have precluded us from getting.

The public access problem is something that has been noted repeatedly time and again and OMB has ignored it.

My final comment on this OMB world view that is so different from ours is that in Mr. MacRae's criticism today of the Senate bill he makes the comment that the bill prejudges, that Congress prejudges before a commission was even established. I just took a look at the bill, and one of the findings that OMB considers prejudgment is the statement that says that an informed citizenry is the foundation of a democratic society. That to me is a fundamental issue which Congress has looked at, is a fundamental principle of our Government, and is not something that is prejudged. It is a core issue.

For OMB to look at that and say that it is a prejudgment, well, we have very different views of what is supposed to happen to information in our society.

Let me turn now to the bill, and let me state right up front that I think it is a good bill. I think it needs some modification, but should move through Committee very quickly. Overall, I think it does an admirable job of addressing a number of very thorny technical issues.

Let me address five of those issues in specific.

The first point I want to address is the regulatory review issue. And what we prepared for you here, unfortunately it is set up a little awkwardly, but in my written testimony is a chart on page 4.

What you see before you is a chart which shows OIRA's interference in the regulatory process. This chart shows the percentage of regulations Governmentwide that have been returned to agencies, changed by OIRA, or agencies had to withdraw.

Now, 1981 to 1983 was a period when the President's Task Force on Regulatory Relief existed. It was a time when the Reagan Administration targeted regulations. Much of it was contentious. Congress held a number of hearings; there were many newspaper stories; and there was public outrage.

If you look at that chart, you see, during this time period, less than 15 percent of all regulations faced a problem at OIRA. It wasn't until 1985, that there was a significant jump in the percentage of regulations running into a problem at OIRA. Since 1985, it has consistently remained that nearly a quarter—and in fact at one point it was above 25 percent—of all regulations run into a problem at OIRA.

This is not a simple problem of one or two regulations; this has now become an institutionalized process. OMB interference is, at least for a quarter of all Government regulations, expected to occur.

Now, you might say, well, okay, we're going to live with that, the threshold is now at 25 percent. But the problem becomes even further exacerbated when you look at specific agencies. For example, if you take a look at the Department of Labor, on average over that 10-year period 43 percent of all regulations ran into a problem—not a quarter, not 15 percent—43 percent.

And if you look at just this last year, 1989, under the new Bush Administration, a drop over 60 percent of Department of Labor regulations ran into a problem at OIRA.

The numbers paint a similar picture with other agencies, such as HUD, in which 41 percent of its regulations over the 10-year period ran into OIRA interference. And in 1989, under the new Bush Administration, 66 percent ran into a problem at OIRA—two-thirds of all regulations submitted by HUD ran into a problem at OIRA.

This is not a simple problem. It is not one that has been addressed yet by Congress. And, accordingly, it is not one that has been resolved. It is continuing, and it is plaguing us. And these are not just simply numbers; these numbers affect people's lives.

The 1986 agreement which Senators Levin and Durenberger championed, helped move us forward to public access. However, again that chart shows that since 1985, in fact since 1986, we will say, since the agreement, there has been virtually no change in the role of OIRA in terms of the substantive interference in agency decision-making.

And in fact, as Attachment A to my written testimony describes, I have detailed very specific problems with the implementation of that 1986 agreement, not even moving into the substantive disagreements we have with that agreement.

I also want to mention that an administrative agreement on regulatory review procedural changes, which has been talked about today, would be an extremely inappropriate way to move at this point, not only because the 1986 agreement wasn't completely adhered to and not only because the 1989 Regulatory Program wasn't published, as you so indicated, but for a number of other reasons. Congress' job is to legislate. This Government is not made up of agreements between individuals. Mr. MacRae may be one of the finest civil servants this Government has known. Our Government is not to be run by an agreement between several Members of Congress and Mr. MacRae or, for that matter, Mr. Darman. This is a Government made up of laws, and OIRA has to be held accountable according to the law.

I also wanted to mention the substance of the bill's regulatory review procedures. As Mr. MacRae said, the issue is not simply one of delays at OIRA, which by the way has continued under the Bush Administration, and which the Senate bill would insure stops.

It is also about OIRA substantive interference into agency regulatory activities. Among the many concerns we have, one stands out—OMB expertise to interfere with the substance of what agencies do. Most often it is difficult to document OIRA interference because access to the records and justification for the OMB decisionmaking is denied to the public. There are a number of other issues that are of concern to us.

But let me say that the Senate bill will do a great deal to ameliorate some of these issues. As a result, we strongly support these provisions. Nonetheless, we think that the section could be improved. I have detailed in my testimony how it could be improved.

Let me turn to the paperwork clearance provisions. I see you're staring at the quality of the chart before you. Unfortunately, the charts made for this hearing were thrown out in the garbage last night when the garbage collection came. We had some thought that maybe it was an Administration or OMB official, but we will say that it is a "kinder, gentler Administration" and it didn't happen that way.

But we blew up the charts by copier this morning, and it's also on page 11 of my written testimony. The chart provides a more clear description of the problem in dealing with the paperwork clearance process.

The issue is not to cut back OMB's responsibilities here. And in fact, as this Committee has talked about this morning, the issue is that paperwork continues to be a plaguing problem for Americans throughout the country.

What is striking about the chart that is provided on page 11 and in front of you here, is we see very clearly that OIRA's use of paperwork powers has been disproportionate.

For example, the greatest paperwork burden caused by the Government comes from the Treasury Department. Forty-four percent of all public burden is caused by the Treasury Department.

Then, if you look at the right-hand side of your chart, the Treasury Department forms have actually gone through almost unscathed at OIRA. Less than 1 percent of all Treasury forms have been disapproved at OIRA.

Now you flip down to the areas that cause the least amount of burden in Government—HUD, EPA, Labor—and you look at the disapproval rates at OIRA, and they skyrocket. They are 14 times, Treasury's at least for Labor and OSHA and MSHA. And yet it's considerably less burden on the public.

The point is that despite Mr. MacRae's view that the paperwork powers of OIRA's activities have not been used in a political manner, it is very clear from the numbers that something very skewed is happening in this Government. And it appears to be targeted to health and safety areas.

Let me address how the bill could be greatly improved in this regard. I think the first and foremost issue is there needs to be much greater respect for benefits as we discuss the burdens in Government.

For example, the discussion Senator Bingaman had with Mr. MacRae about the words "need for" and "benefit." When OIRA makes a decision on a piece of paperwork, it looks at the burden that is imposed on the public. It is not statutorily required, nor is it regulatorily required that OIRA look at the benefit that that same paperwork develops.

Now let me put it in concrete terms. I think that it is a fine effort that OIRA now elicits comments from the public on burden that is developed. However, the problem comes out when a form is submitted, say, to an employer that deals with worker protection. It is the employer that is commenting on that burden. It is not the beneficiaries of that information that are commenting about benefit or burden. So, OMB receives a very skewed response. It is receiving it only from those people who comply with that burden, and so there is no real effort to assess the benefits. That process has got to change.

That is not incompatible in way, shape, or form with the need for reducing paperwork on business or small business in this country. It is a way of better targeting where the reductions should be occurring.

One way to move into that whole arena of looking at benefit and burden is to embrace the undergerding principle that the Senate bill provides; and that is, the information resources management focus. It is precisely the IRM focus that serves as the philosophical housing for looking at how we manage this important national resource, which includes how to reduce paperwork. It also includes how to better manage our information. It also includes how to better disseminate and make information publicly accessible.

I think that the IRM focus in the bill helps to clarify the intent that the framers had in the commission in the 1970's as well as when the Act was passed. And it helps us to move into the 1990's, which brings me to the dissemination section of the bill, which I applaud. As you said, Senator Glenn, the PC was unheard of 10 years ago, and then who knew what "PC" stood for. Today it is clear. We have moved into the age of electronic information. Our Government has to move with us. And this bill takes a first and an important step to move there with the dissemination section.

I must say, though, that I think Congress is going to have to come back and revisit this area a number of times as we learn more about information technology. But I think this is a good beginning step.

I would suggest that the dissemination section of the bill needs to have greater specificity about government wide policy, such as the House bill provides.

I also think that guidance needs to be targeted to agencies instead of OMB. I think those are drafting considerations.

My final comment deals with the authorization issue. OMB today has indicated that it wants a 4-year reauthorization. The Senate bill calls for a 2-year reauthorization.

I don't think there is any doubt that it must be 2 years, and for a number of reasons. First off, we are dealing with a number of new procedures and new activities in this bill. Congress has to revisit these and periodically look at them.

Secondly, I think it has become historically true that Congress' oversight on the Paperwork Reduction Act tends to only occur when reauthorization occurs. It seems to me that oversight is something that has been called for by everyone, whether it is business or whether it's public interest. This is one way of forcing Congress to visit the issue repeatedly and to give the adequate oversight that is necessary.

I also want to comment that OIRA was created by the Paperwork Reduction Act. Today Mr. MacRae alluded that OIRA is carrying out several other functions for OMB, and that was one of the reasons for opposing to have OIRA as a budget line item. I am unclear about what those other functions are. I am also unclear why having it as a budget item in the President's submission draws any greater scrutiny than what Congress already has within its own scope and powers. So that part baffles me.

In conclusion, let me just say that the bill, S. 1742, is a good bill. We have spent a number of months dealing with reauthorization. I respect the process that occurred at the subcommittee level. OMB Watch didn't get everything we wanted. But I also respect that the Committee did its best job to come up with a fair and reasonable bill. I think it would be very helpful at this stage to move the bill along as quickly as possible. OIRA has been acting without any authorization since last October.

This is an important and critical part of our Government. It must be reauthorized, and it must be acted upon quickly.

Chairman GLENN. Thank you. Ms. Ettleson.

TESTIMONY OF SHERRY ETTLESON, STAFF ATTORNEY, PUBLIC CITIZEN, CONGRESSWATCH,[1] ACCOMPANIED BY DAVID VLADECK, PUBLIC CITIZEN LITIGATION GROUP

Ms. ETTLESON. Thank you, Mr. Chairman. Members of the Committee, my name is Sherry Ettleson. I am a staff attorney for

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[1] See p. 402 for Ms. Ettleson's prepared statement.

Public Citizen's Congress Watch. Public Citizen is a nonprofit membership organization representing 65,000 members nationwide. I am accompanied by David Vladeck, senior attorney at Public Citizen Litigation Group. He has substantial expertise in the area of OMB involvement in rulemaking and participated in the Supreme Court decision that came down today.

Mr. Chairman, I commend you for holding these hearings to address the Office of Management and Budget's enormous control over the regulatory process, and taking the necessary time to examine the damage such control has caused to the health and safety of this Nation. I also applaud Senator Bingaman and his staff for all their hard work to introduce legislation to solve some of the problems of concern.

Over the last decade, OMB has injected political ideology into the regulatory process, displacing the discretionary authority of expert Federal agencies. Through the combination of authority under the Paperwork Reduction Act and two Executive Orders, OMB exercises cradle-to-grave control over the administrative process. OMB has used its power repeatedly to cut back on health, job safety, environmental, consumer, and civil rights regulation, by weakening regulations, delaying their issuance, and, in some cases, forbidding an agency to take action. OMB has left its imprint on the lives of many Americans. Because OMB delayed EPA's issuance of a rule to phase out the use of asbestos, millions of people have been unnecessarily exposed to a known carcinogen that causes cancer and lung disease.

Infants were fed nutritionally deficient formula while OMB delayed rules requiring testing of infant formula.

Many young children suffered serious and often fatal Reye's syndrome while OMB delayed rules to require warning labels on aspirin.

If OMB's authority to interfere in the regulatory process is not restricted, we fear that OMB will continue to exercise control over the implementation of vital health and safety laws.

OMB's dominance cannot be doubted. As Jim Tozzi, a former deputy director of OMB's Office of Information and Regulatory Affairs put it, "The Government works using three things: money, people, and regulations; the agency must get all three from OMB."

Under this trilogy of authority, Federal agencies are required to obtain OMB clearance on at least five different occasions: First, when the agency seeks to conduct research and collect information to determine if a problem exists and needs to be addressed; second, when an agency seeks authorization to place a matter on its regulatory agenda; third, when an agency is ready to publish a proposed regulation; fourth, when an agency is ready to publish a final regulation; and fifth, when an agency must secure OMB's approval for the reporting requirements needed to enforce the regulation.

At each stage of the process, OMB has the power to delay, weaken, or even kill an agency's proposed action. With such broad control over regulations, it is hardly surprising that OMB has managed to choke off all but a few health and safety regulations.

Reform is essential. In our view, OMB's power to displace decision-making authority Congress assigns to expert agencies must be restricted for seven fundamental reasons: one, OMB's control is unlawful; two, OMB's control is unwise policy; three, OMB is unaccountable; four, OMB's review is too cumbersome; five, OMB's cost-benefit analysis only measures costs and not benefits; six, OMB's control is inherently undemocratic; and finally, the situation has not changed under the Bush Administration.

I would like to highlight just a few of these points for the Committee. OMB's control denies Congress its vital oversight role. Congress will simply never know when an agency has sought to develop a regulatory initiative but was blocked from doing so by OMB. The same is true for regulations that are submitted to OMB for review but never emerge. OMB takes the position, and a sharply divided United States Court of Appeals agreed, that the public should be denied any information as to when OMB begins its review. As [illegible] result, neither Congress nor the public can determine whether a proposed rule is pending at an agency or whether it is languishing at OMB.

I would also like to stress that OMB's cost-benefit analysis is a stacked deck. OMB is great at calculating the costs of regulations, but it makes no effort to fairly estimate the benefits.

For example, in reviewing the EPA asbestos phase-down proposal, OMB considered only the cancer deaths prevented by the regulation, valuing each life saved at only $208,000. OMB ignored all the benefits associated with controlling disease caused by asbestos, including increased productivity and medical costs and improving the quality of life.

Finally, I would like to emphasize that the situation has not changed under the Bush Administration. Despite public statements by Administration officials, the evidence shows that the Bush Administration is not very different from Reagan's. OMB continues to use its authority to disproportionately interfere in health and safety regulation, an area that is one of the least burdensome in terms of paperwork.

Perhaps the most telling illustration is OMB's recent interference with the efforts of OSHA to issue a standard governing worker exposure to cadmium, a substance known to cause both cancer and irreversible kidney damage. Despite the urgent need for a new standard, OMB has stymied and delayed its development. OSHA was able to finally publish a proposed standard on February 6 of this year, not because OMB relented but because of a court order.

As noted earlier, because OMB generally operates behind closed doors, it is difficult, if not impossible, to accurately trace OMB's involvement. OSHA, however, has placed in its public docket all records exchanged by OSHA and OMB. These records detail the course of OMB's extensive involvement in the formulation of the proposed cadmium standard. These documents make it clear that it is "business as usual" at OMB.

OMB's involvement in highly technical, scientific issues is troubling for an additional reason: OMB has no one on staff capable of addressing these difficult scientific issues. Indeed, the OMB employee handling the risk-assessment issues in the cadmium rulemaking is an economist. Thus, despite the fact that the names at the agency have changed, the problems still exist. In our view, OMB should be stopped from interfering in the process of promulgating substantive rules and regulations. Public Citizen supports congressional action to completely overrule the Executive Orders and modify the Paperwork Reduction Act to refocus its goals to actually reducing unnecessary paperwork burden.

However, if this solution is not adopted, then it is absolutely imperative that Congress place strict and enforceable controls on OMB. Senator Bingaman proposes a solution that takes a prudent step toward placing controls and limits on OMB power to interfere in the regulatory process.

Generally, the bill has a number of features that place meaningful and important constraints on OMB regulatory review. First of all, the bill drags OMB into the sunlight and compels it to operate on the public record. The bill would limit OMB from sabotaging rules through delay, although we would suggest some minor technical amendments to further enhance this provision.

The bill limits communications with persons who are not employees of the Federal Government. It redirects reduction in paperwork in particular areas with the most burdensome paperwork requirements; that of Government procurement and taxes.

It curbs OMB's ability to review paperwork requirements of ongoing regulations.

And finally, it is a reauthorization for 2 years, thus ensuring more vigilant congressional oversight of OMB's exercise of authority and providing sufficient time for both Congress and OMB to assess the changes brought about by this legislation.

All of the reforms contained in Senator Bingaman's bill are positive steps necessary to curb abuse by OMB, but more needs to be done. We urge this Committee to consider some additional measures:

Congress should prohibit OMB from considering or relying on any factors or criteria other than those which the agency head responsible for promulgating the rule is authorized to consider.

Congress should prohibit any OMB review until after a regulation has been proposed, should eliminate the regulatory sunset and require justification of denial of agency paperwork requests, and in considering agency paperwork requests, OMB should be required to evaluate the benefits as well as the burdens of gathering the information.

Another additional measure is to reiterate congressional intent that the Paperwork Reduction Act not apply to signs, labels, and hazard information distributed by non-Government agencies. This was addressed in the case that came down this morning.

And finally, Congress should eliminate the barrier to judicial review.

In addition to Senator Bingaman's bill, we understand that the House Committee is considering a different solution, that of an administrative agreement. In general, we support the substance of this agreement because it would incorporate a number of positive reforms.

However, this solution is problematic because it is extremely difficult to enforce, it leaves the public out of the process, and it has proven unsuccessful in the past. Placing these reforms in an Executive agreement allows only Congress to make certain that the agreement's provisions are fulfilled. It suggests that there are only two interested players, Congress and OMB, in the regulatory process. The public is left out with no input or oversight functions.

A similar 1986 agreement with then-OIRA Administrator Wendy Gramm was not fully honored. Under this agreement, all agency draft submissions were to be made available once the regulatory program was published.

However, in 1989, no regulatory program was published. Moreover, according to the Gramm agreement, OMB is required to make available upon written request all written correspondence with the head of an agency regarding regulatory review. But in fact, OMB does not write to heads of agencies; instead, it corresponds with low-level employees.

In sum, although we agree with much of the substance of the House Committee proposal, we are deeply concerned that these reforms will be placed in an unenforceable agreement rather than in a legally binding statute. If Congress chooses this type of solution, an essential element of this agreement must be a strict reporting requirement to assure that Congress and the public can adequately oversee OMB's compliance.

Mr. Chairman, thank you again for the opportunity to testify. We applaud your initiative to carefully consider this important issue and strongly encourage you to take the lead to protect the lives and health of the public.

I would ask that my full statement be included in the record.

Chairman GLENN. Without objection, the entire statement will be included.

Chairman GLENN. Dr. Bass, in your percentages and numbers of regulations running into OIRA troubles and what you term a "hit list", have you done an analysis not just of the absolute numbers, but of what you view as the relative importance of each particular one of them?

It is one thing to take a total number, but different agencies of Government naturally have different amounts of regulatory issues they are dealing with. For example, while one agency may have, say, 500 regulations, another agency to do its job may only require 50. But some of those might be very, very important ones and others may be of minor importance.

It is one thing to total the regulations, but it is quite another to say that you have looked at them and seen that particular ones had substance and that OIRA held them up for good reason. Many of these seem to fall in the area of safety and health, which I think you pointed out.

Have you tried to evaluate them on the importance of the regulations and whether there was a pattern there that OMB or OIRA was driving at, or pursuing a particular political bent? In other words, did you analyze the content as well as just the numbers of regulations?

Dr. BASS. Yes. Let me respond three ways.

The first is to paperwork versus regulations, because with paperwork we have a much greater handle on seeing the content of what's going on. And, yes, we did analyze it, in a report called "Playing the Numbers," and it does appear as though substantively, as you are suggesting, health and safety as well as statistical collections by the Government have been hit hard.

Senator Sarbanes' reference to the decennial census was one of many examples in which OIRA had a problem with the collection of statistical types of information.

So, yes, you clearly see, at least through the paperwork clearance process, a clear intent on the part of OMB—well, let's not say a clear intent, let's say that the numbers present a picture in which OIRA is controlling the very substant of proposals that agencies are sending per reveiw.

And in fact, an earlier study done by some researchers at Harvard show that of, for example, CDC, Centers for Disease Control, that research that dealt with reproductive and infectious diseases were seven times greater to be disapproved by OIRA than traditional research.

So there is clearly a bias in the content of the review.

Now, to the regulatory review, it is impossible to tell. And the reason it is impossible to tell is that there is no public access to the OMB records. In fact, the 1986 agreement, the administrative agreement there only permits us to take a look at what an agency sent OMB versus what was published in the Federal Register. So you could surmise that something happened, but you don't know who is playing what cards.

The third way I want to answer your question is related to what I saw as an attachment to the Public Citizen testimony which dealt with an OMB paper on risk assessment. The core principle of many of our Government regulations is assessing risk. That is the determination on when you decide to regulate.

Now, that is clearly a scientific and technical issue. Now, for some reason, OMB seems to be unvolved in setting such assessment policy for agencies. A paper drafted by an OMB individual, a Dr. Belzer, was given at a conference held by OIRA and OECD. Although the front page of the typeset paper indicates it only reflects the reviews of the author, when you flip the page it says at the top of each page, "Regulatory Program of the United States Government." I presume this is from the 1989 Regulatory Program that wasn't released.

And then when you look at the substance of this policy that is in there, and in talking to other people that are more knowledgeable on risk assessment, it appears that there is a very skewed perspective here which would limit the ability to do many kinds of regulatory issues. So clearly OMB is imposing its review on agencies—and without proper expertise.

Mr. VLADECK. Senator Glenn, if I may interject, I in my function as a lawyer at Public Citizen Litigation Group, I monitor all of the rulemaking at the Occupational Safety and Health Administration and in fact have been involved in many legal challenges to OSHA's action over the last 12 or 15 years.

One thing that we have consistently done is try to track the role OMB has played in delaying, killing off, or weakening OSHA regulations. We have been very fortunate because Senator Kennedy on the Senate side and other Members of the House have routinely held hearings to explore the question of to what extent was OMB involved in delaying or weakening OSHA regulations.

And so even though there is not normally access to the exchange of communication between OMB and the agency, at least with regard to one very important health and safety agency, we do have a fairly clear public record.

And what we have seen time and again is OMB displacing OSHA's judgment on core questions of science. And this practice is continuing unabated today.

One of the reasons why we attached the article authored by the OMB economist on risk assessment is because we were very concerned that when OMB finally relented and allowed OSHA to publish the cadmium rule—the rule that OSHA estimates for every 6 months of delay an extra 250 workers are likely to contract lung cancer—the rule that OSHA has been trying to expedite but been stymied by OMB, the precise kinds of objections to the agency's reliance on risk assessment that are canvassed in the OMB memorandum appear in OSHA's preamble to its rule, attributed to an unidentified commentator.

OSHA put in its docket the communications between OMB and OSHA, so it's easy to identify OMB in that unidentified communicator.

The point is simply this: It now appears, as it has appeared for quite some time, that OMB is even dictating to agencies on these highly technical questions of risk assessment.

We think it is bad policy. But at the very least, the public and Congress ought to be able to open up this process and debate the wisdom of it on the public record.

Chairman GLENN. Thank you. My time is up.

Senator Bingaman?

Senator BINGAMAN. Dr. Bass, what is your understanding of the status of this agreement between the House and OIRA at this point? Have they implemented this? Is it conditioned upon legislation? What is the status of it?

Dr. BASS. My understanding has changed as of today. Mr. MacRae referred to it as a "framework," and that is a new term of art. My understanding was that it was an administrative agreement between individuals from OMB and at least two Members of the House, Representative Conyers and Representative Horton.

That agreement is not to be put in place at any specific date. My understanding at the time of the agreement was that OMB would adhere to the principles of that "framework" on the date at which the Paperwork Reduction Act is passed. Now, whether or not if the reauthorization bill changes in some way from the Conyers-Horton bill, whether that administrative agreement is subject to change is unclear to me.

Senator BINGAMAN. But there is nothing in place at the present time. It was a way to have a sort of meeting of the minds on what would be done by OIRA without legislating it.

Dr. BASS. Absolutely correct.

Senator BINGAMAN. That is what it was intended to be.

I have no other questions.

Dr. BASS. I might add, related to the regulatory issue, Senator Bingaman, in the testimony I added on page 13 another nice chart, and it was dealing with the experience levels of the OIRA desk officers that are making these decisions, which is in essence the heart of what we are talking about here. We are talking about human beings making decisions.

I have heard Mr. Socolar refer to it as 36 people making important decisions. If you look at the chart, roughly half of these desk officers have no prior Federal experience. Another 31 percent have some Federal experience, but unrelated to the agency in which they are reviewing. So less than a quarter of the desk officers have the expertise to review the substance.

Senator Bingaman. Let me just ask one other question if I could, Mr. Chairman.

Mr. Vladeck, you were involved in this Supreme Court decision; is that right?

Mr. Vladeck. Yes. Public Citizen was a party.

Senator Bingaman. Could you just give us a brief explanation of what they held this morning? I haven't had a chance to see the decision.

Mr. Vladeck. Well, we would be glad to make a copy of the opinion available, Senator.

Essentially, the Supreme Court confirmed completely the ruling by the United States Court of Appeals for the Third Circuit, which held that the Paperwork Reduction Act, as originally written, since now, lapsed perhaps, but did not apply to the situation where the Government was directing an employer or another third party to communicate information to another third party.

So, for instance, with respect to the hazards communication sheets at issue in our case, those information sheets were never submitted to the Government. The court ruled, quite properly, I believe, that the Paperwork Act was never designed to cover third-party transmissions of information. And that has enormous implications for labeling, warnings, other kinds of communications of health risk to the public.

The court divided at 7 to 2, a very clear majority, and we think that the court properly assessed congressional intent in 1980, and we would urge that Congress not disturb this rule.

Senator Bingaman. So basically the court said that where the Congress directs an agency to advise the public of certain information that is one of the agency's responsibilities, OMB cannot interfere with that or require otherwise?

Mr. Vladeck. Well, your Honor, there is an important caveat—"your Honor," I am used to being in court—Senator Bingaman, there is an important caveat: They cannot interfere with that pursuant to the Paperwork Act.

Now, one of our problems is that a hazard warning system like OSHA had developed over a decade of rulemaking could easily be sabotaged not necessarily through the Paperwork Act, but under Executive Order 12291 OSHA would have to submit the underlying regulation requiring the employer to make these hazard sheets available to its employees.

And at that juncture, totally outside our view, totally outside of Congress' view, OMB could simply say "no." And the agency, because the agency cannot publish a regulation until it secures OMB approval, is simply out of luck. And that seems to me to frustrate the purposes of the statute and undermine Congress' judgment in the organic legislation.

Dr. Bass. If I may also interject, Senator, Mr. MacRae said earlier that "the ball is in your court." I don't think that is exactly right. The bass is in your court, but you don't have to dribble it. The court has made its decision. Labeling is not to be reviewed through the Paperwork Reduction Act as a paperwork clearance activity.

Senator BINGAMAN. Thank you, Mr. Chairman.

Chairman GLENN. Thank you.

You have referred to expertise at OMB. Is lack of expertise a major problem? Is the problem also small staff and a lot of regulations coming in? Mr. Bass?

Dr. BASS. Absolutely. Roughly three dozen individuals are mandated with overseeing all Government regulations, all information activities. And on top of it now we have the information resources management of the Government. We are talking about enormous tasks. These are individuals that are largely young, bright folks who have come out of college, that have been thrust into this very important task, and unfortunately many of the tasks involve having scientific understanding, such as this risk assessment issue, or for that matter, scientific understanding of research design, which most don't have. So, clearly, this is a core problem.

But it is one of many problems. For example, what I don't want you to interpret my response to be is why don't we just add another 100 people to OIRA and beef up their skill level and we'll be in great shape. That isn't the answer. The answer is to delegate the responsibility to the agency where the expertise exists.

Chairman GLENN. Well, basically that is what the bill does; instead of making everything at OMB, it would disseminate some of it downhill, but still give OMB the right to come in on issues where it feels there is something wrong going on.

Dr. BASS. Absolutely.

Chairman GLENN. Now, do you agree with that? I don't know whether Ms. Ettleson would or not. She was very critical of OMB. Would you agree with the bill's provision for OMB to come in and pick up things it thinks are wrong, rather than having to pass on everything?

Ms. ETTLESON. Well, they should be offering more of a coordinating function rather than entering into the process in a substantive way and offering—they don't need to be offering—expertise in an area of scientific nature.

Chairman GLENN. Let me ask this: If the bill passed, do you think OMB should still have the power to go into a regulatory agency and say, "No, we disagree with this one. We're going to take that out"?

Mr. VLADECK. Senator Glenn, we disagree with that concept. We don't think that, when Congress has delegated decision-making authority to the Secretary of Labor, that Office of Management and Budget ought to be able to look over his shoulder or her shoulder and say, "No, we disagree with that decision."

Chairman GLENN. You would prefer to have OMB completely out of the loop?

Mr. VLADECK. Right. But we recognize that that is not likely to happen.

Chairman GLENN. I think you're correct. [Laughter.]

Mr. VLADECK. Right. And so as our fallback what we would urge is that procedural restraints be imposed on OMB so that both Congress and the public can have some window into what OMB is doing. But we think that most of our concerns would be addressed.

Chairman GLENN. Let me ask something then. Let's assume for a minute that we cut OMB clear out of the loop. Who would regulate the regulators? That was the purpose of the PRA to begin with; years ago you had regulators running wild. The PRA was a way to sort of rein them in a little bit, within reason.

Somebody has to give a second opinion to places where people might otherwise just go regulatory-crazy. How do we do that? OMB would not do it and things would all be put back to the agencies?

Mr. VLADECK. I think in order to answer your question we have to clearly divide OMB's paperwork review function, which we do not oppose and which we would simply like to see strengthened and allocated in a way that is more responsive to the real paperwork burdens, on one side of the ledger, and OMB's authority under the Executive Orders, power Congress has never conferred and in fact Congress every time it has considered has expressly denied to OMB, to review substance of regulations.

On that side of the ledger, Senator Glenn, we would submit that the President appoints the head of the EPA, the head of OSHA, the head of the Department of Labor. It's hard for me to imagine that Jim Watt or Rita Lavelle or Elizabeth Dole was a wild-eyed regulator who was sort of going to allow regulations to leave their department that posed needless burdens on industry.

We pick—the President picks—his or her Cabinet officers on the basis of a shared sense of political ideology which ultimately is reflected in the rulemaking process. Congress remains available to do oversight; the courts remain available to overturn agency actions that are imprudent.

One of the great myths of OMB's ability in the regulatory field is, I think, shown by the degree to which OMB-rewritten rules get overruled in the courts. If you cast as one indicia of the reasonableness of a rule the ability of the rules to survive judicial review, OMB gets an F-minus.

In virtually all of the health and safety rules that OMB has directed OSHA to change in some way, the courts, including courts staffed by judges appointed by President Reagan, have rejected OMB's rewritten rule. They did it in ethylene oxide, they did it in formaldehyde, they did it in the hazard communication, they have done it in Tampon labeling. I could spend a long time boring you with these illustrations, but there is no evidence at all to suggest that OMB has improved the quality of decision-making in regard to the regulations.

Chairman GLENN. We are going to have to move along here, but did you have a comment?

Dr. BASS. I just wanted to make a point on your question. The question is a very difficult one to answer because a number of scholars have tried to answer precisely what you are asking, which is: How should the regulatory process change in Government?

And I think Professor Sunstein, as he says in his testimony, it's that the administrative part of Government has grown enormously and Congress has not responded to that. And I think that that is a very appropriate role for Senator Bingaman's subcommittee to begin addressing—the proper regulatory role for Government and what the proper role is for agencies, for OMB, for the public, for Congress, and so on.

Chairman GLENN. Okay. Thank you all very, very much. Very good. We may have additional questions for you. We appreciate your being here this morning.

Our next and final witness is Professor Cass Sunstein, University of Chicago Law School.

Professor Sunstein, welcome. We look forward to your testimony. Your entire statement will be included in the record if you have a summarized version that you are going to give.

TESTIMONY OF CASS R. SUNSTEIN, PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL[1]

Dr. SUNSTEIN. Thank you very much, Mr. Chairman. In that case I will be brief, especially since it is after noon.

I am delighted to be here in particular because probably the most important development in the entire regulatory process in the last decade—and the last decade has seen a lot of important developments—has been the rise of OMB supervision of regulation. It sounds less dramatic than substantive amendments to the Clean Air Act or changes in OSHA, but it is probably a whole lot more important than those. And this bill, if enacted, would be the first response by Congress in the entire decade to this new development. And I think something like this, it's about time. We have had a lot of experience with the OMB process.

Now, I am delighted to be here not merely because of the importance of the OMB review process but also because the bill is basically a very solid one which would move the regulatory process in precisely the right directions.

I am going to be speaking about issues of constitutional law primarily and, to some degree, of legal policy. I will say relatively little about issues of public policy, and I won't talk very much at all about those parts of the bill that relate exclusively to the Paperwork Reduction Act. In other words, my focus will be on OMB and the regulatory process, the environment, et cetera.

Now, the general conclusion, as I said, is that this is a sound bill and that the objections of the Department of Justice and of the Office of Management and Budget should be taken with many grains of salt, especially insofar as those objections go to the fundamentals of the bill.

The Department of Justice has made a lot of separation of powers arguments in the last decade, and the Department of Justice has lost in the Supreme Court quite frequently. So one wants to be very cautious with an argument by the Department of Justice that an effort by Congress to regulate the Executive Branch violates the principle of separation of powers.

More particularly, let me outline some details about this bill which seem to me to be not terribly controversial and ought to be endorsed by just about everyone.

Insofar as the bill reflects a statutory rather than administrative resolution of this issue, we all ought to be for it. The administrative agreement is a step in the right direction, but it is unlikely to bring about sufficient compliance; it is not permanent; it does much less than a statute would.

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[1] See p. 451 for Dr. Sunstein's prepared statement.

So, for reasons suggested by Senator Bingaman and others, this is preferable to what is going on on the House side.

Contrary to what was said on the previous panel, it is quite sensible for Congress to endorse, as this bill does, OIRA's power over the administrative process. One wants to divorce, I think, particular abuses of the Reagan Administration and, perhaps—I don't know—of the Bush Administration from the question whether this institution is a good idea. And it's very hard to imagine why any President or any person thinking about American Government would be against the idea that there should be an entity in American Government entrusted with coordinating regulation and ensuring that regulation complies basically with what the President wants, subject to Congress' power to make law.

So, insofar as this bill endorses OIRA's basic role, I think we all ought to be for it.

Insofar as the bill responds to the problem of delay, it does something very important that can be accomplished only by statute. The deadlines are really a very, very good idea.

Insofar as the bill is an effort to restrict and require disclosure of communications between OIRA and private persons, there is no objection to it. There is only enthusiasm for it. And I think in the end the Department of Justice would agree with that position, at least as a matter of law.

There is no legal obstacle to an effort by Congress to say that when the Executive Branch is making a rule and communicating with people outside Government, that communication is something the public has the right to know about. So we want to distinguish here between communications between OIRA and outside parties, members of the chemical Manufacturers Association or, for that matter, members of Public Citizen, distinguish between that on the one hand and internal deliberations between White House staff, say, and the EPA.

Insofar as we are talking about communications with people outside the Government, make it public, that's just great.

Insofar as we are attempting to disclose to the public facts introduced by OIRA into the rulemaking proceeding, publicity with respect to facts introduced by OIRA is perfectly lawful. No problem there. There is a kind of cryptic statement in the Justice Department's memorandum on this issue which acknowledges precisely this point. If OIRA is introducing new facts into the process, there is no legal problem with a congressional requirement of disclosure.

So, too, if OIRA is meeting with people and having lots of meetings or a few meetings and Congress wants to supply lists to the public of numbers of meetings and times and dates of meetings, that is fine. That doesn't interfere with the deliberative process.

Now, what I have said so far suggests that most of this bill raises no serious legal issue. The Constitution isn't implicated with respect to the vast majority of it. And as a matter of legal policy, there is a whole lot to be said for it.

There is one problem with the bill, and that is the requirement that internal deliberative processes within the Executive Branch in the form of communications between, say, EPA and OIRA be disclosed to the public. Now, what I am thinking about here is, suppose there is an EPA rule that is a draft and then OIRA has comments on it saying it's bad policy, and then EPA comes back saying, no, it's good policy, and gives some reasons why. Then there is a debate and discussion.

Now, when we are talking about that sort of internal deliberative process, it has some of the same characteristics as communications between a judge and his or her law clerks, between staffs of the Senate, between law clerks with each other and so forth.

The case of *United States* v. *Nixon* recognizes Executive privilege, which suggests there is a constitutional right on the part of the President to keep secret communications between the President and his high-level advisors.

Now, I am disappointed by the Justice Department's analysis of this issue because the issue is complicated, not simple. But at least there is a plausible argument that the requirement of disclosure of internal deliberations on matter of policy would violate Article 2 of the Constitution, as understood in United States against Nixon.

Now, the case isn't so simple. It's complicated because we are not talking about the President himself and it may be that Executive privilege doesn't apply to people who aren't the President and because it may be that just like in the Nixon case the allegations of abuses, about which we have heard a lot this morning, that the allegations of abuses provide a significant public interest to require disclosure just like in the Nixon case itself, where Executive privilege even with the President was overcome because of the interests in a fair criminal trial. So the case is a complex one, but at least there is a serious constitutional issue.

Counting votes is always hazardous. [Laughter.]

But I would guess this part of the bill, the requirement of policymaking deliberations being disclosed to the public, I would guess that this part of the bill would be invalidated by the District of Columbia circuit and upheld by the Supreme Court in a hotly contested and closely divided vote.

Notwithstanding those predictions, I think probably the thing to do here is to change the bill as far as it requires disclosure of internal deliberative processes; and here is why:

This requirement is unusual and unprecedented. FOIA doesn't require it. This requirement raises a serious public policy issue insofar as it would interfere with the unimpeded give-and-take that any branch of Government needs. OIRA already is willing to agree that it would disclose this. And finally there is a possibility that the Supreme Court would strike this one down.

Now, that leaves, as I said, to a pretty simple solution. The simple solution is that section 112 of this bill is sound except in this particular, and this particular is something that could be solved through an administrative agreement requiring disclosure. That is to say, some partial deletions from this bill of disclosure of internal deliberations would save a big headache and a difficult constitutional case, ensure constitutional validity, and at the same time an administrative agreement would be able to bring about disclosure of precisely the same things.

What I am suggesting is a kind of mix of administrative agreement buttressed by a big statute representing about 85 percent of what this already does. Now, that kind of mix, I think, would promote the healthy purposes of this bill without compromising the legitimate interests in informal give-and-take within the Executive Branch.

I will be happy to answer any questions you may have.

Chairman GLENN. Thank you very much.

I have a letter here which Mr. Darman sent over to me yesterday from OMB.[1] He generally says the bill does some good things, but then he says there are a couple of things that he has concerns about. One of them is the issue of making public internal Government communications, as opposed to making public Government communications with external or outside-the-Government people.

He says, "The equivalent for Members of Congress would be a statutorily required public file on the substance of all communications Members have with constituents."

Do you see that as a like situation in comparison?

Dr. SUNSTEIN. No, because if we are talking about a public file of communications between agencies on rulemaking and outsiders, then the model under the Administrative Procedure Act is one of reasoned decision-making and publicity.

Chairman GLENN. Okay. But I understood from what you said before that you thought that if there was to be a file on communications between the Government and parties outside the Government, that having a requirement to release that information would be okay.

Dr. SUNSTEIN. Absolutely.

Chairman GLENN. But if it's internal, if it was between EPA and the White House, and their dickering back and forth over something, that that would be privileged and should not be made public.

Dr. SUNSTEIN. I would say it might be privileged, and it is a very hard question. We are really in uncharted waters here. I think you would win in the Supreme Court. I predict this would be upheld in full. I am not confident of that. It would be a real fight. It's a new issue.

Chairman GLENN. The issue has been around long enough. There's not much to get excited about now. [Laughter.]

Dr. SUNSTEIN. Well, the reason, Senator Glenn, is that Congress has never really tried to require disclosure of internal deliberations. I think there is a lot to be said for that restraint.

Chairman GLENN. Yes.

How do you view the administrative sidebar agreement, as has been proposed over in the House? Mr. Darman says in another part of his letter that the President might veto a bill if it contained such an agreement in statute. If we put it in statute, do you think we would be upheld if there was a fuss about that? The President would undoubtedly veto it.

Dr. SUNSTEIN. I want to suggest that the discussion, it would be unfortunate if the discussion between Mr. Darman and this Committee turned into, "Yes, this bill," "No, not this bill." It's possible to change this bill, I think, in minor ways that ought to satisfy some concerns that Mr. Darman has that are legitimate.

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[1] See p. 270.

Now, if one wants to enact this, I am all for a statute rather than administrative agreement. A administrative agreement is a weird creature, and as you said, Senator, it's not permanent. So an administrative agreement seems to me inadequate.

If this bill is going to compel disclosure of internal deliberations, it would be very surprising if the President didn't veto it, and then one would have a real constitutional fight if it were passed over his veto.

Much simpler, it seems to me, would be minor amendments in this bill which would not go so far as to require disclosure of internal deliberations, and then see what happens. The bill would still do, I think, 80 percent of what it seeks to. It wouldn't do, maybe, that 20 percent in addition. That 20 percent in addition would be done by the administrative agreement without raising the constitutional fuss.

Chairman GLENN. Well, we will have to look at that again and see where we go with it.

We have two Executive Orders, 12291 and 12498, that we view as sort of creating a two-tiered regulatory process; one for the agencies pursuant to their statutory missions, and the other which we view here as having more of a political standard to it.

Do you view them that way? Is that an inconsistency?

Dr. SUNSTEIN. I hope OMB review doesn't mean the introduction of political considerations that are inconsistent with what Congress and the experts say. Keep in mind, these Executive Orders both say, "to the extent permitted by law," which means that to the extent consistent with what Congress has said and to the extent consistent with the vesting of the authority in the agency heads rather than OMB.

If OMB is introducing political considerations, understood as its own ideology, independent of what Congress wants, then that is illegality and something ought to be done about it. This bill represents a step in that direction.

My understanding of the OMB process, incidentally, is a little more complicated than this, that in some very public, isolated, important examples, OMB, especially in the first part of the Reagan Administration, was using its dislike of regulation to argue against regulations, even to block regulations that were a good idea.

But all the formal papers, even OMB's formal papers, say that that is unlawful and not permitted.

In other words, to say it more crisply, your description does seem to me to have some degree of accuracy, but it not consistent with the Justice Department's memorandum upholding these Executive Orders and it's not consistent with OMB's own understanding of its mission.

Chairman GLENN. Well, I think you were in the room earlier when I mentioned some of the things that happened to OMB early in the Reagan Administration that we all found very onerous, as David Stockman published his book and indicated what had happened over there. Picking a theme and then cooking the figures to match the theme wasn't quite the way OMB was supposed to operate. So we hope we are onto a better day, which I think we are at this point. [Laughter.]

Dr. SUNSTEIN. Right.

Chairman GLENN. Let me come back to what we were talking about a minute ago. I am sure you are aware it has been suggested in testimony today and in previous hearings before this Committee that the level of technical and scientific expertise in OIRA is not high and that there is more such expertise at the various agencies.

Let's assume for the moment that this is true. If we do not provide for greater disclosure of what goes on between the agencies, following their legislative mandates and OIRA, following its Executive Branch desires, doesn't that put at risk the true effectiveness of our system of checks and balances?

Dr. SUNSTEIN. Yes. The checks and balances are endangered also by requiring disclosure of tentative conversations within the Government. So there is a worry about checks and balances with congressional interference with the informal give-and-take of the process.

Now, I do endorse the suggestion in the previous panel of a broader look at OIRA's role. It might be that the reviewing function should be performed by some entity other than OIRA or that there should be some effort by Congress to assure that the people in OIRA know what they're doing.

But to require disclosure isn't the best way of bringing about expertise, because to require disclosure doesn't ensure that the people speaking are experts. A disclosure requirement won't make the desk officers at OIRA any more expert. It might scare them some.

Chairman GLENN. Well, as the bill provides, it takes some of OMB's current authority and gives it back to the agencies, but still gives OMB the power to come in on issues where it thinks it's important and, in effect, overrule.

Do you think that is a good arrangement?

Dr. SUNSTEIN. No. I think the Justice Department's own understanding, I hope OIRA's understanding, and I would want this bill to make clear the understanding, is that OIRA has no authority to block a regulation ever—not once. The reason is that it is up to Congress to decide, subject to presidential powers of supervision, who is going to be making these decisions on the environment or occupational safety.

It is for the Secretary of Labor, not for OIRA. OIRA can supervise and talk, and if the President doesn't like what the head of EPA is doing, what the President can do is fire the head of EPA. But even the President can't make the decision because Congress has allocated the decision to the head of EPA.

Chairman GLENN. Then, as you would see it, the agencies would have full authority to regulate as they saw fit and the only rein on that would be congressional oversight?

Dr. SUNSTEIN. That is the only coercive rein. There is a rein in the form of the fact that the President can fire these people and in the form of supervision and discussion by OIRA. But OIRA has no authority to say "don't issue this regulation" or "do issue that regulation." Congress has vested the authority in the head of the EPA.

The court can always check for arbitrary decisions that produce decisions inconsistent with what Congress has said.

Chairman GLENN. Well, we don't take that outside the Executive Branch of Government. You used EPA as an example, and I should note that we are about to upgrade the EPA to Cabinet status. EPA is part of the Administration and part of the Executive Branch.

Dr. SUNSTEIN. Right.

Chairman GLENN. When we pass a law here, we give it to the Executive Branch to execute.

If we are to oversee every rule and regulation that comes out, and do it in a timely and appropriate fashion, I couldn't even begin to estimate how many additional people we would need here on Capitol Hill. I don't think we're likely to do that.

Dr. SUNSTEIN. Well, Senator, I am very enthusiastic about OIRA's role as a coordinator and regulation of the regulators. Let's draw a distinction between OIRA blocking regulations because it doesn't like them, and OIRA coordinating and supervising, giving advice and guidance, setting out general guidelines. That's just fine. I am all for that.

I disagree with the OMB Watch people who think OMB should be cut out of the picture. I think that would be a real mistake.

OIRA's own conception of its role, as stated everywhere, is that it has no authority to say no or yes, it only has authority to consult. In Executive Order 12291, during the period of great enthusiasm by President Reagan for Executive oversight of the regulatory process, even President Reagan's Department of Justice said, rightly, that OIRA may not displace the agency's decision.

So, what I am suggesting is—I think now I am speaking really consistently with what the Justice Department and OMB now think—there is no authority to block. Jim Miller got in big trouble for saying there was authority to block, because his Justice Department said, "You don't have that power."

I think OMB and the Department of Justice think OIRA has authority to coordinate, to give guidance, to give guidelines, to consult, to ask for reconsideration. But the ultimate power of decision is for the agencies, not for OMB.

Chairman GLENN. I think the way it has worked, it is alleged, is that OIRA has been able to, in effect, block what they didn't like by asking for more information, sending it back to the agencies, and keeping the studies going. In effect OIRA, de facto blocked the regulations.

Dr. SUNSTEIN. Right. And that is illegal.

Chairman GLENN. Yes.

Okay. Any others? Does staff have questions?

[No response.]

Chairman GLENN. Thank you. We may want to submit some additional questions to you. It has been a long hearing this morning. Thank you all for your patience.

The hearing will stand in recess until tomorrow morning at 9 a.m., same subject, same place.

[Whereupon, at 12:41 p.m., the Committee was adjourned.]

REAUTHORIZATION OF OMB'S OFFICE OF INFORMATION AND REGULATORY AFFAIRS

THURSDAY, FEBRUARY 22, 1990

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:05 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn, Chairman of the Committee, presiding.

Present: Senators Glenn, Bingaman, and Roth.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. The hearing will be in order.

Today is the second day of hearings on S. 1742, the Federal Information Resources Management Act, a continuation of yesterday's hearing. Senators Bingaman and Lieberman are sponsors of this measure. It is an ambitious and constructive effort to build upon the Paperwork Reduction Act of 1980 and provide a new authorization for the Office of Information and Regulatory Affairs, OIRA.

We have been asking our witnesses to give us their views of what works, what doesn't, and what recommendations they have. As I mentioned yesterday, when President Carter signed the 1980 act, he called it a law to, "regulate the regulators," and that was part of its intent.

We have heard a lot about the abuses that occurred in the past 9 years. The allegation has been that the power of OIRA has been used to push an ideological agenda instead of good information management. The Supreme Court decision yesterday buttresses the argument that the Paperwork Reduction Act was used by the Reagan administration to extend the power of OMB in ways not intended by Congress, and in a direction making it more difficult to establish health and safety protections for workers through regulation.

Senator Bingaman's bill is an attempt to meet all the concerns and improve the way the executive branch attempts to minimize paperwork demands on the public, which was the PRA's basic purpose. It is a complex subject, and I would commend the reading of the morning papers to you, if you haven't already seen them. Both the New York Times and the Washington Post have extensive front page articles about the Supreme Court's ruling yesterday, which looks as though, at least on the surface, that it really cuts back on some of the authorities that OMB has taken for granted up to now.

I don't know yet until we have a chance to look into this decision more as a committee with our staffs whether this means we will need to rewrite some portions of the proposed legislation. I haven't had an opportunity to talk about this with Senator Bingaman or Senator Lieberman yet, but the stories in this morning's papers spell out some of the problems that we are up against. All these years the Paperwork Reduction Act has been used as the authority for OMB to do some of the things that the Supreme Court has now ruled they could not do.

So I don't know whether that means we have to fall back and regroup a little or not, but we will certainly have to look at this decision very carefully.

In some ways I think the way Senator Bingaman crafted this bill has already taken care of some of the problems the Supreme Court has looked at, in that it decentralizes some of the authorities out of OMB. Maybe we are already dealing with this problem, but I think we have to look at it in light of the Supreme Court's ruling yesterday.

With those brief remarks, I won't go into any more detail about the decision except to commend the reading of these articles to you, because both the Times and the Post really spell out in some detail where we stand right now.

Senator Bingaman, any remarks?

OPENING STATEMENT OF SENATOR BINGAMAN

Senator **Bingaman**. Well, just very briefly again, I appreciate your having this second day of hearings, and I do think the concerns were well explored yesterday in the hearings that we had. Some that I mentioned and that I will continue to try to inquire about today are, first of all, whether this paperwork review process we have in place works. Most of the indications we had in our hearings last summer were that it did not work very well, that in fact the paperwork burden continues to grow and that that needs to be a continued concern and something we need to continue to deal with.

Second, of course, is the lack of any kind of comprehensive Government information strategy or policy or any effort to really get our arms around the problem of how we handle information in the Federal Government.

Third, is the issue of regulatory review which, in my view, has been pretty much an all-consuming preoccupation of OIRA, and what the proper role of OIRA is in that process and what rights the public ought to have to be aware at least of what's going on in that review process. Those are the kinds of issues I will continue to question people about today. Thank you.

Chairman **Glenn**. Good. Thank you very much.

Our first witness this morning is a man who has had a lot of experience in this particular area, especially when the PRA was being put together back in the Carter years, Stu Eizenstat of Powell, Goldstein, Frazer & Murphy.

We also have as a witness Sally Douglas, Assistant Director for Federal Government Relations, Research and Policy, of the National Federation of Independent Businesses, accompanied by Douglas

P. Allen, Legislative and Regulatory Chairman, Association of Records Managers and Administrators, and Roy Radigan, Midtown Professional Records Center, Cleveland, and Laura Henderson, Prospects Associates, Rockville, Maryland. So we have a whole table full this morning.

Stu, if you would lead off we would appreciate it.

TESTIMONY OF STUART EIZENSTAT, POWELL, GOLDSTEIN, FRAZER & MURPHY, ON BEHALF OF THE COALITION FOR REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT [1]

Mr. EIZENSTAT. Thank you, Mr. Chairman. If I may, just on a personal aside, state what a pleasure it is to appear before you. I have the utmost respect and admiration for you, and I feel privileged to have known you for as many years as I have. And with Senator Bingaman, of course, I feel, as he will know, almost a familial relationship.

I am Stu Eizenstat, and I am testifying here on behalf of the Coalition for the Reauthorization of the Paperwork Reduction Act. It is a group comprised of multiple industry, trade, professional and citizens associations and a diverse group of American businesses.

My principal purpose is to urge you to retain the principles and purposes originally embodied in this important public law. As President Carter's chief domestic policy advisor, I was, in fact, personally and directly involved in the development and enactment of both the Paperwork Reduction Act of 1980, and a 1979 Executive order which preceded it, as part of our concerted effort in the Carter administration to streamline Government, make it less intrusive and to reduce the costs on the private sector, particularly for small businesses.

As the President said when he signed the bill into law, he was acting not only to regulate the regulators, but also to allow the President, through the Office of Management and Budget, to gain greater control over the Federal Government's appetite for information from the public. He said, for the first time it allows OMB to give the final word on many of the regulations issued by the Government.

Mr. Chairman, one of the things that I would like to mention is to put the Committee in the context of looking at the President of the United States as the chief executive officer, of what in effect is a giant trillion dollar corporation with over a million employees. And as a chief executive officer of this nonprofit executive branch corporation, he needs every management tool at his disposal to bring some cohesion to that branch. This act provides one such tool, and I would urge this Committee to take no action which in any way diminishes the President's constitutional responsibility to control the budget, the regulations, and the paperwork costs which the agencies under his control in the executive branch may impose on the public.

While the Paperwork Reduction Act was, of course, born out of our administration, it owes its origin to a bipartisan effort involving not only the President, but key Republican and Democratic

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[1] See p. 473 for Mr. Eizenstat's prepared statement.

Members of the Congress. Together we shared the belief that the act was not a matter for partisan division.

As one who has almost a parental interest in the original legislation, I am proud of the legacy which it represents, and it is my understanding that the President in a brief note to you has urged that at least the basic thrust of the legislation be retained.

I am aware of the charges advanced early in the Reagan administration that OMB was using the paperwork reduction review to make substantive changes in regulations issued by the agencies, something that the Supreme Court decision brings to mind.

In enacting this law this was not our intention. It was contrary to both the plain language of the statute and our intent, which was to deal with paperwork reduction. I do, on the other hand, believe the President does need to have wide-ranging authority over regulations as well.

I want to particularly applaud the efforts of Senator Bingaman for his concern with the issue, his willingness to extend the original act, and for the considerable energy and effort he and his staff have expended to make the act more effective.

Our coalition appreciates the fact that he has maintained an open process which has permitted a variety of our groups to express their views, and we appreciate that no effort has been made in his legislation to diminish the standard of review for the initial approval of paperwork. We are convinced that the Senator's commitment to reducing the costs associated with Government paperwork for as many people as possible is in fact a very real one and we appreciate that.

Senator Bingaman has also recognized the need to reduce the paperwork burdens associated with Federal Government procurement. A report on this problem, requested by the 100th Congress, was recently released by the Office of Federal Procurement Policy. It states that the administration estimates that almost 290 million hours are expended annually by the contracting community simply to meet current procurement paperwork requirements.

Even using a conservative estimate of an average of $50 an hour to compute the cost of compliance with these requirements would amount to a burden of $14.5 billion a year. And indeed, we believe these estimates grossly understate the real burden for procurement paperwork. I will return to this issue of procurement in just a second.

At this time, Mr. Chairman and Senator Bingaman, I would like to express some specific concerns we have with certain of the provisions of S. 1742 before this Committee. Number one, we strongly recommend the deletion of the proposed new section 3507(J), which provides that the Office of Information and Regulatory Affairs, OIRA, can only overrule renewals of agency decisions required by rules when they are found to be arbitrary and capricious.

As this provision is now written, absent a showing that the paperwork in question is arbitrary and capricious, there would be no effective outside review of agency compliance with the self-certification provisions required by the rule.

Since the majority of paperwork actions are required by rule, agency incentives to engage in meaningful review of their paperwork renewal requests would be greatly diminished. This is a much more stringent standard, Mr. Chairman, than the standard of the current law which requires only that OIRA find that agency informaiton collection requirements are, "necessary," for the task at hand, a standard which has been wisely left in terms of the initial agency collection requests.

The proposed arbitrary and capricious standard is, in our opinion, an inappropriate one for mangerial review by the President, through his office, charged with complying with the sound management objectives of paperwork reduction.

The job of management is essential to the presidency. To manage effectively the President needs a strong executive office capable of bringing coherence to the processes of Government. Changing the standard of review on renewal requests from necessary to arbitrary and capricious in our opinion substantially weakens any paperwork reduction review and weakens the President's grasp of control over is own executive branch.

Second, we recommend the deletion of the amendment to Section 3507(D), which would removed the automatic termination feature of the current sunset provisions of the act. The sunset provisions require that the approval for any paperwork that has not been explicitly reauthorized by OIRA expire every 3 years.

I can speak personally on this, Mr. Chairman, to say that President Carter felt it critical for agencies to continue to have to justify their paperwork requirements under changing circumstances over time. It was a central feature of his Executive Order, which I helped draft, and of his 1980 legislation. It was at the core of meaningful paperwork reduction, and I would urge that it be retained.

Three, we recommend that the period of reauthorization of the act be extended, because the central purpose was to make Government less burdensome. And we believe that the 2-year reauthorization set forth in S. 1742 is too short to meet an objective which requires a certain amount of stability in terms of what the Government is going to require. We would recommend that the act be extended for as long as possible, but certainly for no less than 5 years.

To illustrate the continuing importance of paperwork reduction, let me select as an example the problems associated with the sale of "off the shelf" commercial products to the Federal Government. These problems were recently explored in an outstnding series of hearings conducted by Senators Levin and Cohen and your Subcommittee on Oversight of Government Management, and resulted in the passage of a reform initiative in last year's defense authorization act. The only problem, frankly, is that the impact of the law was limited to the Department of Defense.

As those hearings demonstrated, the commercial sector is routinely confronted with paperwork requirements wholly unrelated to the Government's needs. These producers are frequently required to justify their price reasonableness of goods with prodigious amounts of accounting data unrelated to requirements of commercial businesses. This is true despite the fact that the goods are produced and sold in competitive markets and that the Government's own buying activity is additionally conducted under a standard of full and open competition.

Despite this dual competitive pressure, commercial products procurement are normally burdened with heavy information reporting requirements. As a result, many sellers of commercial products and services do not compete for Government contracts. Accordingly, the Government and, frankly, the taxpayers are deprived of the advantages of vigorous competition, economies of scale, short delivery times, market driven efficiencies, technological innovation, and high quality products that are commercially available.

The Packard Commission was particularly concerned with these problems and addressed many of its recommendations to the urgent need to relieve the procurement system of the information burdens which were strangling the process. In this regard, I have submitted to your staff a letter from David Packard discussing these issues.

We have developed some concepts that address this problem, and would be happy to share them. Mr. Chairman and Senator Bingaman, with you and your staffs. We have specific suggestions, and we believe that OIRA should undertake an impact analysis of the situation. It is clearly within OIRA's jurisdiction to make it easier for commercial products manufacturers to sell readily available commercial products to the Government, and the reauthorization of the Paperork Reduction Act represents an excellent opportunity to take specific action.

In other words, we would distinguish between products which the Government is asking strictly for itself that have to be tailor-made, as oppose to Commercial products that are alrady sold on an "off the shelf" basis.

Mr. Chairman, to conclude, we believe that the reauthorization of the act is essential to the effective regulation and functioning of our economy in society and to the exercise of any meaningful managerial function by the President of the United States as the head of the executive branch.

I thank you and the Committee for your time. We have a formal statement which I take it will be submitted for the record and at the appropriate time we will look forward to you questions. Thank you.

Chairman GLENN. Without objection, the entire statement will be included in the record. Thank you.

Our next witness, Sally Douglas, Assistant Director for Federal and Government Relations, Research and Policy, National Federation of Independent Business.

TESTIMONY OF SALLY L. DOUGLAS, ASSISTANT DIRECTOR FOR FEDERAL GOVERNMENT RELATIONS, RESEARCH AND POLICY, NATIONAL FEDERATION OF INDEPENDENT BUSINESS,[1] ACCOMPANIED BY DOUGLAS P. ALLEN, LEGISLATIVE AND REGULATORY CHAIRMAN, ASSOCIATION OF RECORDS MANAGERS AND ADMINISTRATORS, ROY RADIGAN, MIDTOWN PROFESSIONAL RECORDS CENTER, CLEVELAND, OH, AND LAURA HENDERSON, PROSPECTS ASSOCIATES, ROCKVILLE, MD

Ms. DOUGLAS. Thank you, Mr. Chairman.

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[1] See p. 484 for Ms. Douglas' prepared statement.

NFIB, which represents over 560,000 small business owners across the country, thanks you very much for the opportunity to appear and talk with you about this very important act. NFIB has been fighting to reduce the burden of paperwork on small businesses at least from the time of the Commission on Federal Paperwork, on which we served, and represented the small business interests. We are also proud to have helped enact the original Paperwork Reduction Act, and we are here today to indicate that we support full reauthorization of the act and its original intents.

Paperwork reduction has been a major issue for small businesses for as long as anyone can remember. Senator Bingaman was absolutely right in his opening remarks when he stated that the paperwork burden seems to continue to grow. Certainly that is the case for small business.

In 1988, according to an SBA report, small business still spent a billion hours filling out Government paperwork at a cost of $100 billion. That is an awful lot of money spent for unproductive paperwork requirements. Even so, with the centralized authority that has been established under the Paperwork Reduction Act, OMB has over the past 10 years been able to make some significant strides, both in compelling agencies to take a realistic look at their paperwork requirements to try and get an accurate picture of the real burden that is imposed on the public, and to try and find ways to eliminate duplication, change and simplify forms, and other ways to reduce the existing burden.

One of the difficulties, quite frankly, is that with every new law that is passed by Congress and every new regulation that is promulgated each year, the burden will continue to grow, because paperwork still remains one of the chief tools of enforcement of any new law. You could probably hold days of hearings on the merits of the Paperwork Reduction Act, the concerns that various interested parties have, et cetera. The fact remains that paperwork is the most visible link between the public and the Govenment, and it requires a steady hand, a steady review, and strong Congressional oversight to make sure that this burden is kept at an absolute minimum and that it is conducte in the most efficient and effective manner.

During the drafting of the bill that is before the Committee, S. 1742, we were able to produce several positive changes in the bill that we believe will strengthen certain aspects of the paperwork reduction process. These include an expansion of the definition of paperwork burden to include the time and resources required to review, compile and maintain information and complete specific forms.

Other positive changes give agencies more responsibility for review of their information, their own information collection requests, require trained career professional IRM officials, require use of the Federal Information Locator Service to help cut down on duplicative and unnecessary collections, restore practical utility to its original definition, and strengthen the findings and purposes.

We do, however, have some grave concerns with Section 107 of Title I of the bill, which details separate procedures for reviews of rule-based and non-rule based collections. We are uneasy with this section for three reasons: According to S. 1742, the 3-year review process in the current law will apply only to non-rule based requests. Yet OMB estimates that 90 percent of information collections originate from a rule or regulation.

That means the majority of requests could effectively be removed from the 3-year review process. Rules or regulations produce not only the most information collections, but the most burdensome ones. To remove these from the process would abrogate a fundamental element of the current PRA and constitute a significant backwards step in the battle against excessive paperwork.

The section further limits OMB authority by allowing an OMB override of agency self-certification only if the agency decision on continuing the collection activity was arbitrary and capricious. I don't mean to be repetitive of Stu's remarks, but I agree completely with what he said about the difficulty with that standard.

It will likely discourage OMB from challenging an agency review, which would be most unfortunate, and it undercuts one of the original intents of the PRA, which is independent clearance authority for OMB.

We are generally supportive of giving the agencies increased responsibilities to control their own paperwork burden, but the system will simply not work without an independent final review by OMB.

Self-certification assumes that agencies with a sufficiently independent IRM office, which will be difficult to achieve in the real world, will keep a strict watch over their own information collection requests, even without an outside central reviewer to make the final decision. That's a giant leap of faith that frankly we are not prepared to take at this point.

As an alternative, we support allowing the agency IRM official to review a request and approve, disapprove, or make necessary changes before submission to the director. The director, however, we believe should have final approval authority.

Another fundamental problem, we believe, is the flawed assessment by agencies of the actual burden imposed by a particular information collection. We support increased small business participation in assessing realistic paperwork burdens and the formation of paperwork requirements.

As a part of this, we support addition of a burden box to let the business or individual know what the agency estimate of the time needed to fill out the form was, and to take the idea further, we would suggest also there be a place to fill in the actual time it took to complete the form.

The review procedure proposed in S. 1742 is unacceptable to the NFIB as it would weaken the process by which ongoing collections of information are reviewed. We would, in fact, argue that it effectively exempts up to 90 percent of all reviews, and if this is actually the case, that would put us in a worse condition than we were in under the Federal Reports Act of 1942, which effectively exempted 75 percent of all the burden.

These changes fundamentally alter the PRA. Given the choice, Mr. Chairman, we would support straight reauthorization of OIRA over the bill currently before us.

Thank you very much for your time. I would be happy to answer any questions.

Chairman GLENN. Thank you very much.

You are both representing various parts of the business community, and I wanted to ask you first about the numbers that the Business Council for the Reduction of Paperwork, BCORP, has used to estimate the magnitude of the paperwork burden. You both have referred to specific numbers of limited segments of the business community.

Are you familiar with BCORP's estimate that American business spends 8.2 billion hours, at a cost of $330 billion annually, to respond to paperwork requests? And I believe 6.3 percent of the GNP was the BCORP cost figure that I mentioned yesterday.

Are you familiar with those figures, and do you think they are credible? they are enormous figures.

Mr. EIZENSTAT. We have seen those figures and we haven't done an independent verification of them, but we frankly felt that the $14.5 billion a year figure was grossly understated, and it may be that somewhere between that figure and the figure that they used lies the actual amount. But we would say it is certainly more on the high side than on the low side in terms of where the burden lies. I would not say that that is grossly out of line with where the actual figures may be.

Chairman GLENN. Well, it is sort of mindboggling to think that the paperwork requirements put on business by the United States government would comprise 6.3 percent of the GNP.

Ms. Douglas, do you have comments on that?

Ms. DOUGLAS. Mr. Chairman, I was not aware of those figures, although in my statement I just mentioned that the small business sector alone spends a billion hours, according to a recent SBA report, so it is not inconceivable to me the 8.2 billion hours would be pretty much along the mark.

I can tell you its been a very difficult process for years and years to really get a handle on the actual burden. The Commission on Federal Paperwork tried it. OMB has tried it. GAO has tried it. Various people have tried it, and it is very difficult. One of the reasons, I think, is because, depending on what kind of business you are, whether you are big or small, what industry you are in, the actual time it is going to take you to comply with this same request is going to vary dramatically.

Chairman GLENN. So it varies from one person to another in their ability to fill out the forms. GAO's estimate was 1.8 billion hours. But whether it is 8.2 as BCORP says, or 1.8, it is still an awful lot of time.

Mr. Allen.

Mr. ALLEN. Senator, if I could interject briefly. I have a copy of the testimony given by Mark Richardson, the executive director of BCORP, before the Subcommittee on Government Information and Regulation, dated June 16th, and I think within the testimony and within the record of those hearings there is some demonstration of how those figures were calculated.

Within the Federal Government I have seen estimates by Dr. Leon Transo at the U.S. Department of the Interior that essentially state that the cost is in the range of $166 billion. I don't know which we might prefer to believe, but $166 billion is still quite significant and, in fact, it accounts for more costs imposed upon business than Federal corporate taxes bring in.

Chairman GLENN. Well, we could argue all day over whether GAO, CBO or figures by others would be correct, but it is an enormous figure in any event, and shows the importance of this legislation.

Have any of you had a chance to look at the morning reports in the paper or to do any analysis of the Supreme Court ruling yesterday? Do you think that this is going to require us to take a little different look at this legislation?

Mr. EIZENSTAT. Mr. Chairman, I have not read the full opinion. I read the New York Times and Washington Post accounts of it, and it certainly opens a whole gamut of questions which I think necessitate your Committee taking a very broad look at this whole area now.

The distinction which the Supreme Court drew was a distinction between information required for the Government, itself, as opposed to information that third parties, or private parties, were providing to other private parties, for example employers to their employees.

This is not an easy distinction to make. For example, one of the successes, I think, of the Paperwork Reduction Act had to do with the W-2 forms, which don't necessarily fit neatly into either one of these two categories.

I have tried to go back and reconstruct, in looking at the President's Executive Order, what our original intent was and how far we wished to go, and I think I would say the following: First, if one looks at the actual terms of the Executive Order and the President's message, it appears to use examples and language which talk about the Government's need for information. And that would seem to imply that in fact the distinction made by the Supreme Court might be an accurate one, requests for information or information requested by the Federal Government of the private sector for its own use, and that is the distinction the Supreme Court makes. On the other hand, I am also quite convinced that the President wanted the broadest applicability in terms of paperwork.

The second point I would like to make is that I don't believe we intended, when the Paperwork Reduction Act was passed, nor when we signed the Executive Order, that it would be the statutory basis for substantive OMB review of agency regulations. That was not the intent of the Paperwork Reduction Act. It was, as stated, an effort to reduce paperwork, make forms more manageable, and so forth.

Chairman GLENN. To cut our excesses and to make sure that you didn't require a lot of paperwork just because somebody proposed doing so.

Mr. EIZENSTAT. Right, and I think it should not be used as a statutory basis for substantive regulation.

But third—and this is why I think that your Committee ought to take a broad look at this—I do believe sincerely that the President is in fact a chief executive officer. He has got to have the widest amount of control over his agencies. And we had a lawsuit that was filed against the President in an OSHA case about whether the President had the authority under our Executive Order to control an agency substantively regulating in the OSHA area.

We very strongly believe that the President had to have that constitutional authority. These were agencies under his control. So while the Paperwork Reduction Act, itself, may not provide a statutory basis for that, I think there needs to be either an Executive Order or a statutory basis for that. And so therefore I would like to see your Committee really take a very broad look at this.

Chairman GLENN. Do you have an opinion on the Court's opinion?

Mr. EIZENSTAT. Well, I certainly can't overrule the opinion, but my opinion on the opinion is that it probably is a valid distinction, and that when we enacted the Executive Order, that we were looking more at the information burdens the Federal Government was requiring on the private sector for its own use, and we did not intend the act to be used as a substantive justification for involving ourselves in regulatory activities involving the private sector.

Chairman GLENN. Let's let Ms. Douglas respond too.

Ms. DOUGLAS. Mr. Chairman, I have not read the entire opinion either, I have read short blurbs about it. We were rather concerned when we heard that the Supreme Court had ruled against the Government, because in our opinion, the HazComm case seemed to be a case of the Paperwork Reduction Act working as it was intended to, which was to protect businesses from excessive paperwork burdens, making allowances for some interested parties to participate in that regulatory decision without jeopardizing the overall goals to be achieved by the regulation.

Obviously, the Supreme Court thought that there were some further distinctions to be made. But in reviewing the legislative history of the Paperwork Reduction Act, this question of the linkage between OMB's responsibility to oversee the regulatory process and paperwork reduction was extensively discussed. And, in fact, in the Senate report, which I have with me, there is a paragraph about the importance of this linkage between OMB's existing responsibility for overseeing the regulatory process with the closely related information management functions assigned by this bill, and the Senate believed this combination of functions worked well.

In other words, OIRA was set up in anticipation of this bill passing anyway. They already had regulatory responsibility. The basic concept behind that was something that the Senate not only evidenced but agreed with, as did the Controller General of the GAO at the time. It is a question I believe merits considerable investigation by the Committee.

Mr. EIZENSTAT. What I would like to say is that I don't have any doubt the President has the constitutional authority to do what OMB was attempting to do by relying on the Paperwork Reduction Act. The real question is whether the act, itself, was drawn to give the President that authority, and the Supreme Court said it was not, and I think you can make an argument that it may not have been. But that begs the question of whether the President should have that authority. We exercised it, and I think the Reagan and Bush administrations have exercised it in part under their own Executive Order. And I think if they had exercised their Executive Order instead of just relying on the Paperwork Reduction Act in this case, Mr. Chairman, the Supreme Court might well have upheld it.

Chairman GLENN. I will ask about those Executive Orders later. My time is up.

Senator Bingaman.

Senator BINGAMAN. Thank you, Mr. Chairman.

I certainly agree with you, the President needs to have authority to manage his own branch of the Government, but obviously, the Congress has an interest in seeing that that is done consistent with the law, and that when Congress directs a particular agency to do something, that that agency's ability to implement that statute is not impeded by delay or some other type of regulatory impediment that the OMB or some other agency of the Federal Government imposes.

So I think what we are trying to do is find a way to balance that so that the President can carry out his duties, but that they would be consistent with what Congress enacts and what the President signs into law.

Regarding this distinction between rule-based and non-rule based requests for information, I think what we have been trying to do is say that, okay, OMB has exercised authority to review proposed rules. And if they approve a rule which requires a certain collection of information, and then as the agency goes about trying to collect the information, there needs to be a different standard at that point for OMB's further review of the effort to carry out the rule.

I mean, there needs to be an end to the process somewhere where OMB can't say, okay, we have the right to review your reg, we approve the reg saying you can collect the information, we still have a right to review the document that you are going to use to collect the information. At some stage I think there is a legitimate question of whether OMB ought to be able to continue to delay and stop the thing.

Let me just ask your organization, where do you stand on the provisions of the bill which put deadlines in for the time that OMB can sit on these things? Is that a reasonable thing for Congress to want to do?

Mr. EIZENSTAT. I think it is reasonable, yes. Whether it should be 30 days or 60 days is a debatable point. But yes, I think it is reasonable, Senator, and I frankly have much less problem with that than I do imposing an arbitrary and capricious standard for rule-based information, because a very substantial amount of the paperwork burden comes from just that source. I don't see why one should draw a sharp line in terms of the standard between that non-rule based.

But yes, there is no reason why OMB, or any other agency, should sit on proposed regulations for an unnecessary period of time to try to wipe the agencies out.

Senator BINGAMAN. What about the provisions we have in there that open the process up to scrutiny in that we require a public file to be established once one of these rules is pending at OMB so that the world at large can determine what the essential points of disagreement or debate are? Your view, is that an unreasonable interference with the abilities of the President to control his own branch of Government?

Mr. EIZENSTAT. I think if it goes too far it can be. This is a very tough question, and a very valid Congressional concern. I am a strong supporter of the Administrative Procedure Act, because I think what the act does is it guarantees due process to interested outside parties so they know what Government is doing and things are on the record.

At the same time, I think the President does have to have the managerial control. And the question, as you say, is how to square that circle. Now, I think, for example, there is no reason why there shouldn't be some log kept of contacts in terms of the time the calls were made. But I would have great difficulty with having anything other than the final proposal that is given to OMB actually on the record.

I really think that it would greatly intrude on the confidentiality that is necessary for the executive branch to carry on its business if every draft of a proposed regulation going up and back from the agencies to OMB was made a matter of record at the time that was occurring.

Senator BINGAMAN. You know, one distinction that was made yesterday by Professor Sunstein, I believe, was the distinction between OMB communicating with others in the Federal Government and OMB communicating with the private sector. The concern, of course, has been that private interests have in the past had fairly free rein to lobby OMB on matters that are pending there which the rest of the world at large is not even privy to, and therefore you have a sort of very limited access or view into the process by some special interest groups with a very clear agenda in mind, and that is to weaken the regulations that the agency would like to have promulgated.

So what would you think about us insuring that any kinds of communications with interested parties in the private sector be part of the public file?

Mr. EIZENSTAT. Well, again, I think this is a very tough question. I do think that there is every reason for a private sector contact that is made to OMB to be a matter of the record insofar as that there was such a contact by such a group. The date, the time of the meeting and so forth, in other words a log. I would have some real concerns, again, however, about having to disclose that, and I think that OMB Director Darman's own letter to the Chairman in which he analogizes the attempt to disclose that type of information to your having to disclose your own constituent's request to you substantively is a valid point, and I would be concerned about going beyond a mere log and having to actually bring out to the public view the contact which is made.

Senator BINGAMAN. Would you think it fair for Congress to prohibit these contacts?

Mr. EIZENSTAT. No, I would not want those contacts prohibited. I think, again, they should be logged so that people know which groups talked to OMB, but the nature of their discussions and the substance of it I think are permissible. I think they are natural and normal, when you have regulations that dramatically affect the private sector, to expect that they are going to be involved in the same way they would lobby the Congress and you would want to keep their information to you confidential.

Senator BINGAMAN. Okay, my time is up, Mr. Chairman.

Chairman GLENN. Thank you. Have the rest of you had an opportunity to review the newspaper accounts this morning of the Supreme Court's ruling yesterday?

Mr. ALLEN. Not in detail.

Chairman GLENN. I wanted to get an idea of whether you feel we really need to redo some of this legislation as a result of the decision. I don't think it is going to require a major rewriting, but we have to take the decision into considerations.

We have had some unintended consequences as a result of the Paperwork Reduction Act. I don't think the drafters of PRA ever meant to provide a lever for broadening OMB's power to control regulation, but that has been the result of the way it has been executed sometimes. Paperwork reduction should not have a higher priority than health and safety protection. I think we would all agree with that. I think that has been one of the problems, and that is what the Supreme Court's ruling basically dealt with.

In your responses, Stu, to Senator Bingaman's questions, I would gather that, in the main, you support putting Executive Orders 12291 and 12498 in statute?

Mr. EIZENSTAT. I frankly would. I think it is time for the Congress to take a very broad look at this and see if it can be made into an acceptable the statute, with this recognition, however, and I want to be very clear about this. That is, regularize it, to make it clear that the Congress is a willing participant in this activity, but I would not want to see a statute that diminished the authority that the President has sought through those Executive Orders to exercise.

Chairman GLENN. Do you agree with that, Ms. Douglas?

Ms. DOUGLAS. Frankly, I had not thought for several months about the Executive Orders becoming statutory, but I think in essence I would agree with what Stu has said. I think that makes a great deal of sense.

Again, what you are trying to do is achieve a balance between all the interests that are involved, the presidential authority, Congressional responsibility to oversee and make sure that the laws are enforced in a proper manner, the public's interest in making sure that there is a balanced and effective regulatory procedure instituted.

I would agree in the main with what Stu has said.

Mr. EIZENSTAT. I would say, if I may, Mr. Chairman, that in this regard I am speaking for myself. This is not an issue that our coalition has addressed, nor have we addressed the Supreme Court decision which, of course, came after my prepared testimony.

Chairman GLENN. Do you feel that we should specifically legislate with respect to commercial products, particularly with regard to DOD?

In the last session, Senator Levin, Senator Bingaman, and I cosponsored legislation on the DOD authorization bill which seeks to encourage DOD to buy commercial products. Now, we have had complaints about GSA rulings, or regulations, 14-11 and 14-12, which have been brought up as problem areas under what is called cost and pricing data, where all these forms have to be filled out, even though they concern straight commercial products. It may be just a Xerox machine or something that has a very common business use, but cost and pricing data that normally apply only to brand new research and development, where there is no basis for costing, are required of these commercial products also.

If we have regular sales data and cost data and it is a competitive situation, do you believe that we need to specifically legislate on this bill with regard to commercial products?

Mr. EIZENSTAT. Yes, sir, I do. I know that both you and Senator Bingaman also are on Armed Services and that you have studied this issue. We think that what Senator Levin did was an important step forward, but it needs to be across the board, not just with respect to DOD.

Again, it is very important to draw a sharp distinction. It's one thing when the Government tailor makes a product, an MX missile, or the Midgetman, which is used only for itself. In that case, that kind of cost allocation requirements are certainly desirable.

But when you have a commercial product that is sold in the marketplace, and particularly one that is subject to competitive bidding, to require the same sorts of cost allocations is to really put an enormous and unfair burden on the private sector. And I think, as the Packard Commission indicates, it is the greatest single impediment to the Government using commercial products which could save a tremendous amount of money.

Chairman GLENN. Do you see that as having a proper place in this legislation, or should that be in separate legislation?

Mr. EIZENSTAT. No, sir. We really see this as a very appropriate place for it. We think it is right vehicle for it. It does relate to paperwork reduction, and we would very much like to see the two tied together.

Chairman GLENN. Do you think it is legitimate to set a 5 percent annual goal for reduction of paperwork?

Mr. EIZENSTAT. I think it is good to have goals, there is no reason not to, and as long as people don't get put in jail if they don't reach it, I think it is a good idea.

Mr. ALLEN. Senator, with regard to those goals, I think they are important from the standpoint that they send a very clear message in terms of what the intent of the Congress is. They are obviously nonbinding. There is not sequestration of paperwork that I have witnessed thus far.

Chairman GLENN. I thought perhaps by setting a goal, if we ever got around to making people justify it, we would be creating more paperwork to justify the 5 percent than we saved. Maybe we are on a slippery slope in that area, I don't know.

Mr. Radigan, do you have any comment on that?

Mr. RADIGAN. Well, I sit here as a small businessman and look at all the numbers that are being thrown out, and I see it from a more real sense, what it costs me. And I am in an unusual situation in that I store business records. I have made a business out of taking all of this paperwork that is created and making a service out of it.

Chairman GLENN. We are not trying to put you out of work. [Laughter.]

Mr. RADIGAN. Trust me, with what's out there we don't need any more. Our industry has tripled in the last 10 years. And what amazes me is this is with the existence of a strong Paperwork Reduction Act. To see some of the changes that are being made concerns me as a small businessman. I see things happening. For example, this is one form that was required to be filled out by certain clients of mine. After countless hours of, I am sure, developing this form, countless hours of trying to fill it out and understand it and basically conform to the requirements, they pulled it because it was too complicated.

How many hours went into that, I don't know. I have seen some other examples of that, such as the Form 5500 which small businesses have to fill out in regard to 401K applications, or pension funds. That form alone cost me probably $1,000 to have an administrator from my local bank who I do it through to take care of it.

I have probably 400,000 cubic feet of records which is held in a building probably about the same size of this building here. One-third of those records are probably due to forms and Government requirements for reporting.

I would feel more comfortable with seeing either a repeal or basically a reauthorization of the current act, or possibly looking at some other possible legislation that could come up through some of the work that ARMA is doing with their paperwork reduction standards. I think it addresses the situations much better.

Mr. EIZENSTAT. Mr. Chairman, I would say, if I may, that rather than simply have an arbitrary goal, which, again, I think is useful, but rather than relying just on that, it is more important to have systemic reform. And in the proposals that we will be submitting to you and Senator Bingaman and your staffs, we suggest systemic ways in dealing with this commercial product procurement issue.

For example, that when there is competitive bidding, that no cost analysis data would have to be required, and even when there is no competitive bidding, if it is a commercial product, that the agency would have to do its own analysis initially before asking for information.

So I think that if one did that, we would get a lot more than 5 percent.

Chairman GLENN. My time is up. I have always had a little problem with setting a goal of 5 percent. It means if somebody was already doing an efficient job of holding down extra paperwork, how do we get them to 5 percent, where somebody else might need 25 percent? So it is a little difficult to set that across the board. It is a good thing as just a goal and I don't quarrel with it that much.

Senator BINGAMAN. Mr. Chairman, after hearing what Mr. Radigan's business is, I can see why the favor reauthorizing the present law, if his business has tripled in the last 10 years. But I have difficulty understanding why the Federation of Independent Business feels that the present law is what they want.

I really think that there has been a major distinction which has gotten lost in debate on this thing, and that is the distinction between reviewing regulations and reducing paperwork. I mean, there are occasions where those 2 overlap and where OMB or OIRA can review a regulation and by disapproving it or changing it can reduce paperwork.

But there is an awful lot of paperwork reduction activity that has nothing to do with substantive review of regulations. And it seems to me, just viewing it as a lay person here, I just don't see a whole lot of attention by OIRA to the reduction of paperwork as distinct from the review of regulations, and the substantive review of regulations.

I can understand all the reasons that the President would like to be able to have substantive review of regulations, but the main goal of the law that was enacted that now has expired was to get at the paperwork problem, and I don't really think OIRA has organized itself well to do that.

I can see the problems that you would have with the legislation we have proposed. You have explained those. But to say that your preference is to keep the present act and really nothing else, doesn't seem to me a very responsible way to deal with the situation.

Ms. DOUGLAS. Senator, my actual comment was that given the legislation as a whole vis-a-vis the current PRA, we would take the current PRA and, effectively, take our chances. I would agree with you, at least from a personal standpoint, not necessarily talking on behalf of the National Federation of Independent Business. I have sat before this Committee on several occasions before, discussing our frustrations with OIRA and their attempts—specifically during the Reagan administration—their attempts, or lack of attempts, to really grasp and do something with the small business paperwork problem.

I would also concede to you that it is very, very difficult for us, as well as them or anyone else, to really get down to the point where you can take specific forms that small business fill out and eliminate or simplify them. In other words, there are some big ones out there that are obvious targets. They have been taken care of years and years ago. There are some slightly more pervasive kinds of situations because small businesses fill out so many different kinds of forms, it is very difficult to grapple with. And I would also agree with you that in many instances during the past administration, the emphasis was most definitely on the regulatory process as opposed to paperwork reduction.

If you review the Committee records, you can see that the last time I appeared before this Committee I gave OIRA a "D" when asked by Senator Danforth to give them a grade strictly on their paperwork reduction efforts for small business.

This may sound a little strange, but without OIRA there, even though they have not done a terrific job, to throw the burden, or throw most of the responsibility on the independent agencies, all of which have a vested interest in collecting as much information as they want or need for their own purposes, and to say that, in essence, those people are going to be in final arbiters, I don't think solves the problem.

I think that you have a basic structure in the Paperwork Reduction Act which has not been sufficiently enforced and has not, frankly, been given strong oversight by Congress, except for a few notable Senators who have been involved in this process for a number of years. But Congress as a whole grapples with the paperwork question every once in a while and then goes on to bigger and better things. And it requires some sort of consistent oversight and some consistent working with OMB and OIRA to solve the problem. We would very much like to help in that process.

Senator BINGAMAN. I understand what you are saying, I agree with much of it, but my point is that there are not just two options, what we have proposed and the present law. There might be a third option, and that is strengthening the requirements on OIRA to get about the job of dealing with paperwork.

Ms. DOUGLAS. There is, in fact, a third option that was already written down. The gentleman at the end of the table already referred to it. There is a draft that was put together by ARMA that is essentially a very good approach to this problem.

Senator BINGAMAN. Where is that draft? We don't have it.

Ms. DOUGLAS. It has not been entered into the record yet.

Mr. ALLEN. Senator, I would like to submit it, with the Chairman's permission, as part of the written record. It is, essentially, alternative language that we would like to submit to the Committee for consideration.[1]

Chairman GLENN. Without objection.

Senator BINGAMAN. That would be very handy to have.

Ms. DOUGLAS. I think that there are some real good ideas in conjunction with some of the good ideas in your legislation that would get us a lot farther in the process.

Senator BINGAMAN. All right. We appreciate that. Thank you, Mr. Chairman.

Chairman GLENN. Thank you. You opted for a longer authorization, not just a 2-year authorization.

Having gotten into this issue with these hearings, I would probably go for a 20-year authorization instead of 2-year one! I don't plan to repeat this every 2 years if we can prevent it! I am only joking; I want the record to show that I am not serious on that. I don't think it should go 20.

How long do you think it should be?

Mr. EIZENSTAT. We think that it should be at least 5 years. The original act in 1980 came up in 1986, I believe, and I think 5 years would be the least one should have, so that you have some stability in the area, and particularly if this is going to be an area where you are going to take an even broader look given the Supreme Court decision. I think we need some stability.

Chairman GLENN. Ms. Douglas, you mentioned the fact that you have 11 million weekly payroll reports just to comply with Davis-Bacon. I don't know whether the Government needs that kind of information weekly or not either. And, I believe you said in your testimony that 80 percent of your members have 10 or fewer workers.

Ms. DOUGLAS. Eighty percent in the construction industry.

Chairman GLENN. In the construction industry? Okay.

From your familiarity with these things, what should be the reproting period on these requirements? Do we require too much too soon too often? In dealing with things like Davis-Bacon, what paperwork requirements give you the most problem with small business: tax law, labor law, environmental law, health and safety? What forms are the most enerous?

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[1] See p. 1032.

Ms. DOUGLAS. Okay. That's interesting. Taxation paperwork continues to be a problem because there is so much of it, and everyone has to fill it out. That probably, in every survey that we have conducted over the past 10 years, has in a given area been the number one problem. Health and safety is a growing concern but as yet, or at least at this time—it has been a significant concern in the past, it kind of died back a little bit, now it is beginning to come up.

Chairman GLENN. I am talking about paperwork requirements now, not public health and safety concerns.

Ms. DOUGLAS. I understand, not the regulations, the paperwork. Every time the census comes out with any kind of census, either the overall, the census of manufacturers or whatever, we get all kinds of calls. An awful lot of the paperwork that small firms deal with they cannot indicate to us which particular form it is. An awful lot of times they cannot tell us whether it is a Federal form or a state form. There is just so much of it that at this point they are sort of just being inundated. But taxes always seems to be a big one.

And again, I think that in certain instances the IRS has done a pretty good job of cleaning up their act with regard to certain forms. But again, there is always just so much of it.

Chairman GLENN. What are most onerous for the rest of you? Ms. Henderson, you haven't commented yet.

Ms. HENDERSON. Well, I am a Government contractor, and as I think you noted in your legislation, Senator, we are heavily burdened. It is a cumulative effect. It is everything. I think that my company has three to five times as many employees involved in paperwork as a company that does the same amount of volume in the private sector.

I was talking with a friend the other night who runs a company of about $1½ million and when my company was that size we had about 5 people working on paperwork. She has one person who is able to do it in the 8 hours. My people are in often at night and on the weekends.

So it is a cumulative layering, duplication of information, the same certifications going on over and over to the same agencies. The same information. As a Government contractor, for instance, we recently won a contract that we have to attach almost an audit trail to each of our invoices.

Chairman GLENN. How much would be duplicative information? That was supposedly one of the advantages of having OMB be the coordinator; they would coordinate requests from different agencies asking for the same thing.

OMB was supposed to be able to do that, but I don't know that that has ever been done. You are saying there is a lot of duplication from one agency or department with another; is that right?

Ms. HENDERSON. Even within the same agency. As a Government contractor, they ask for the same information time after time after time. So that, for instance, let's say a cost proposal that you would submit to the same agency that you had already submitted 50 other cost proposals to, you provide the same 25 pages of forms that you have signed. I mean, it seems to me that you can certify once to an agency a year and then report exceptions or changes.

I think those kinds of rational looks at the kind of paperwork that we are faced with, there seems to me to be logical, simple solutions. I have been very impressed with the Office of Federal Procurement under Al Burman's leadership in looking at very practical ways at those kinds of things, but there is a lot of duplication.

Mr. ALLEN. Senator, to give you just a brief overview of one subset of the paperwork problem, whether we are dealing with small businesses or large businesses, a member of our association, Donald Scupski, who is both a certified records manager and an attorney, has compiled a work which would provide business owners, private sector personnel, really with an overview of just the Federal recordkeeping requirements. This is just a small subset of the paperwork problem, and here are the two volumes in which he deals with strictly the Federal requirements. There are additional volumes that deal with each individual State.

That's a small subset, and one of his caveats in the purchase of this type of service from him is that he is not sure he has caught them all.

So just in one small subset, if I were a small businessman faced with problems of paperwork and subsequently recordkeeping problems, this is really what I have to deal with. Fortunately, there is this kind of a tool to work with, but it is a major headache just in the recordkeeping area.

Chairman GLENN. Thank you. Senator Bingaman.

Senator BINGAMAN. I have no other questions, Mr. Chairman.

Chairman GLENN. I think we had better move along here, because we do have other witnesses this morning. We could obviously go on with more detailed questions for all of you. We appreciate you all being here this morning very much. Thank you. It was very helpful.

Our next panel is Dr. J. William Hirzy, President, National Federation of Federal Employees, Local 2050, at the EPA, the Environmental Protection Agency.

TESTIMONY OF J. WILLIAM HIRZY, PH.D., PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2050 AT THE ENVIRONMENTAL PROTECTION AGENCY,[1] ACCOMPANIED BY RUFUS MORRISON, PH.D., SENIOR VICE PRESIDENT, LOCAL 2050

Dr. HIRZY. Good morning, Mr. Chairman. With me is Dr. Rufus Morrison, who is Senior Vice President of our local.

Chairman GLENN. Good. Welcome.

Dr. HIRZY. I would also, on a personal note, like to extend my warmest, best wishes to you on the 28th anniversary of one of the happiest and most memorable events of the 1960s in which you were the central player.

Chairman GLENN. It was a couple of days ago. It is getting to be ancient history now.

Dr. HIRZY. Not for some of us.

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[1] See p. 494 for Dr. Hirzy's prepared statement.

I'm William Hirzy, and actually President-Elect currently of Local 2050, National Federation of Federal Employees, and we represent the professional staff at EPA headquarters. Many of these employees participate directly or indirectly in the agency's acitivities related to the Paperwork Reduction Act. We appreciate the opportunity to testify on S. 1742 and other activities of the Office of Management and Budget under Executive Orders 1291 and 12498.

My oral testimony is principally based on one specific example of how the PRA review process at OMB affected EPA's effectiveness and employee moral, and it offers some recommendations that the union believes will improve both of these things. I have also submitted some written material comprising the union's testimony given last year before Mr. Conyer's and Mr. Sikorski's Committees of the House addressing OBM's review activities also.

In 1987 EPA was engaged in the development of an effluent guideline regulation for the pesticide industry under the Clean Water Act, one element of which was to gather information from the regulated community be means of a survey. EPA designed a survey instrument and submitted it to OMB for review in December of 1987 and published a notice of its submission in the Federal Register inviting public comment.

In the following month EPA and OMB received word that the National Agricultural Chemicals Association, NACA, objected to some aspects of the survey. At this point, which was about 30 days into the review process, OMB informed EPA informally that the new survey would not be cleared until EPA met with NACA to discuss the objections. EPA was taken aback at this development, but moved quickly to resolve the problems by meeting with representatives of NACA and the Natural Resources Defense Council, which had expressed concern about delay in the rulemaking.

EPA held three meetings with industry and NRDC during the remainder of the review period but was unable to get from NACA a clear statement of the industry's objections to the survey, other than some relatively vague statements about the sensitivity of providing certain financial data.

I would point out that this objection is not a valid cause for disapproving a survey under the PRA.

EPA had demonstrated the need for the information in its submission to OMB and had a complete set of procedures to protect confidential business information. Nevertheless, OMB saw fit to dispapprove the economic portion of the survey at the end of the review period, which was in April of '88, stating the EPA had failed to collect the financial data in the least burdensome way and it hadn't demonstrated the pratical utitility of certain financial information.

We saw this rejection of disingenuous since the OMB staff had acknowledged early in the review process, before NACA had contacts, by the say, that the survey in fact was quite well designed. And EPA had also experienced continuing opposition by OMB to the development of effluent guidelines in general. And it seemed like these arguments that OMB was raising about, "burden," and practical utility, were just a convenient way of delaying or weakening the regulation as part of the administration's overall policy of opposition to environmental regulations.

Since EPA's position was that disputed economic questions were essential to the ruling making projects, it went ahead and elicited further comment on the form from several individual pesticide companies, several of whom in fact had been contacted prior to the OMB review during the process of developing the survey instrument. On finding that these individual companies found the survey generally acceptable, EPA proceeded to inform NACA, NRDC and OMB of the fact, in August 1988.

At the time industry officials acknowledged that EPA had demonstrated the survey ahd practical utility, but they didn't withdraw their objections. On this point, it is ironic to note that in 1986 the industry had successfully challenged a previous EPA effluent guideline on grounds of inadquate supporting data and now was trying to prevent EPA from developing a more comprehensive database.

EPA prepared a resubmission to OMB in the fall of 1988 with the original survey design supported by an expanded justification statement. And after the survey was resubmitted, NACA officials requested a meeting with several assistant administrators. At the meeting NACA restated its objection to providing the sensitive financial data, and EPA management, trying to keep the rulemaking project on track, developed a compromise that would settle for somewhat less data but wouldn't weaken the regulation. This compromise made the completion of several questions optional, with the understanding that where a company chose not to provide data, EPA would make assumptions about the firm in its economic models.

OMB was informed of the agreement and after some additional delay it approved the survey, about one year after the initial admissions submission. Promulgation of the final rule will be delayed at least 6 months by this incident. I understand in speaking with the water office folks recently that the manufacturer's effluent guidelines will be out in about 1992 and the formulator's guidelines will be out in 1994.

The lesson that we draw for this example is that OMB too often expresses a mind set that any paperwork required of the regulated community is suspect and that EPA must, through the kind of delay imposed in this case, be forced to prove that the information requests are not too burdensome.

We don't contend that EPA has never made too burdensome an information request. In fact, before I came to EPA I was with Monsanto Company for 19 years, and in fact was involved in a response to an information request which was completely outrageous. What we did at that time as in the normal course of doing business as a private sector company does with the agency, we spoke with the people who were involved in this request and got that thing racheted down to where we were going to provide just exactly a reasonable amount of information, and we think that is the way this process ought to go in general, that there is the face to face, normal, open contact between the regulatory agencies, and people who are concerned about excessive paperwork should be handled in face to face contacts between the agencies and the private sector interests, and that's perfectly reasonable way fo doing business. It worked for us then.

We also do not contend that a Government entity such as OMB serving as a watchdog is always superfluous or a hindrance to good Government. Some level of review clearly is warranted. What we do contend is that as EPA improves its operations with a greater degree of early and cooperative interactions among affected parties, such as I just alluded to, and with better professional accountability and tighter internal and external peer review of our Civil Service work products, which was the case in the development of the reviews in this case, the burden of proof should shift to OMB's shoulders, and your provision of the arbitrary and capricious standard in Section 107 I think is exactly a step in the right direction.

Under the present language in the PRA, OMB can determine whether a collection of information is, quote, necessary for the proper performance of the functions of the agency, and whether the information will have practical utility.

It is very easy and tempting, and in fact it has been the case, for OMB to interfere with EPA's substantive regulatory decisions by questioning the practical utility of data to be collected. Although the PRA does currently state that OMB authority shall not be decreased or increased with respect to departments and agencies, in reality the PRA has increased OMB's ability to delay or influence regulations by deciding when, if at all, an agency may collect information and what the content of the collection would be.

So we think it is, as I said before, perfectly appropriate for you to set the standard that you have in Section 107 that requires OMB to show that the agency has acted in an arbitrary and capricious way if it is going to disapprove of an information request.

We believe that by including that language, you are going to not only improve the efficiency of Government directly by streamlining the review process at OMB, but it is also going to have an indirect benefit by stimulating cooperation among the social entities involved and by improving EPA moral.

When EPA employees know that their professional work products are going to be honored and that their work is not going to be thwarted in the OMB review process, they will have a greater motivation to first class work and their view of OMB could change from one of an antagonism to one of collegiality. And this is going to be nothing but a benefit to all parties.

I point out to you the fact that we have an enormous turnover at EPA. The annual turnover down there is between 15 and 20 percent. Now, I don't claim that all of that is due to problems that we have with morale with respect to OMB interference in our work. Clearly there are other factors at work, but I have got to tell you from the staff's standpoint, it is a major problem that we don't really seem to ever get anything done down there and that OMB interference in our work is a large factor in that. And my written testimony speaks to that with respect to the asbestos rulemaking under TSCA Section 6.

Chairman GLENN. How much of the turnover is just a matter of our inability on the Hill to deal with pay matters?

Dr. HIRZY. With pay? That is part of it. I think we lose a lot of folks, especially out of the Superfund and solid waste programs, to the private sector. You know, a person comes in at a GS-7 or -9, making $25,000 or $30,000 a year, gains a year or 2 experience of experience, and then some private contractor comes along and offers 50 or 60 and the person is gone. That's clearly a big part of it.

We would also like to ask you to take steps to keep OMB out of the business of the substantive review of our professional work products, especially the scientific work products, such a risk assessments. There is already sufficient political control, we think, over the use of our scientific work to the Civil Service, an to have a bunch of junior grade and marginally qualified, quote, analysts, unquote, at OMB who are under constant pressure to twist the professional work of us sworn to duty Civil Servants to fit some partisan agenda is to invite further well justified degradation of the public's confidence in Government.

We in the Civil Service, like you in Congress, want to take pride in our work and we want the public to recognize our work as worthy of pride. In this regard, I would also like to express support for the provisions in Sections 106 and 112 that put into the statute requirements for public disclosure of OMB's dealing with interested parties to rulemaking. Our experience with OMB interference in the asbestos rulemaking under TSCA Section 6, which is, as I said, covered in my written testimony, speaks quite eloquently to the problems associated with secret dealings between OMB and the private sector.

We ask you to help us make professionalism and quality the watch words of our Civil Service work by keeping OMB on the track of improving, partisan politics out of the execution of our professional duties. Thank you.

Chairman GLENN. Thank you very much. You say that you feel that these requests should be negotiated, that face to face contact between the regulator and the regulatee should be the way we do some of these things. Now, that may be okay when you have a major corporation like Monsanto but I am not at all sure that that would work as general rule which applies to everybody regardless of the size of the entity.

Ms. Douglas just testified a moment ago—she was representing NFIB—that 80 percent of their members have less than 10 employees. I don't know that they are going to be able to go into either a regional office or contact a Washington office to be able to do this kind of face to face negotiating. We are not a Government of personalities and individual negotiations, we are a Government of laws, and that is a rather fundamental point.

I am not sure that taking just a face to face approach, while it may work for a big company, is what would work for everybody, and what we should put in the law.

Dr. HIRZY. I think especially for matters other than environmental regulations. I can speak only with knowledge respect to EPA's activities. She may very well have a point with respect to dealing with the Treasury Department and so forth, that those kinds of things may well be a real problem.

Chairman GLENN. From your view, do you think that S. 1742 goes far enough to remedy the problems your testimony suggests exist in OIRA's compliance with public disclosure and time limits in both paperwork and regulatory review?

Dr. HIRZY. Yes, I think so. I am really very well pleased about the public disclosure aspects of Sections 106 and 112.

Chairman GLENN. Do you think that we ask for too much information? Does EPA—where you work now—need all the information it asks for?

Dr. HIRZY. We do a lot of soul searching down there when it comes to asking for information.

Chairman GLENN. How do you cover that in paperwork requirements? We probably have a form for soul searches some place, I wouldn't doubt it!

Dr. HIRZY. Yes, right, soul searching is SF-482 I think.

But actually, the way this survey form was developed, in dealing with the person who helped me with this testimony, the fact that it was done in a collegial way with the very industry that was going to be surveyed, a number of companies were brought in, they talked about what would make a reasonable survey instrument, and that survey instrument was crafted with the help of the regulated community. And I think that that's a perfectly reasonable way to operate and that's, you know, one way in which unreasonable information requests could be handled.

Chairman GLENN. How much more information do you believe we may need sometime in the future, as opposed to information that is needed now to comply with existing law or existing problems?

Dr. HIRZY. I think, frankly, in the areas that I have been involved in, the comprehensive assessment information rule under Section 8 TSCA, for instance, I was involved in that exercise, and that gives us very broad authority to seek information under TSCA.

But every element in that rule is vital, or may be vital, as some time in the assessment of some chemical's potential risk, and the provision of that rule which says that the agency can ask for only certain sections of the information again is perfectly reasonable. We don't, for instance, ask for the entire 9 yards of information for every chemical under every circumstance. We may pick out 8 or 9 different questions under that rule and ask only those that are required, and that is the way that rule is operated, and I think that is a perfectly reasonable way to go.

Chairman GLENN. Senator Bingaman.

Senator BINGAMAN. Thank you, Mr. Chairman. As I understand it, the present version of the Clean Air Act, has requirements in it for disclosure of interagency communications. That's communications between OMB and EPA that relate to the Clean Air Act provisions.

We are, of course, encountering a lot of opposition by the Justice Department and OMB to the idea that we would put those same disclosure requirements in this legislation applicable outside the Clean Air Act.

Do you have any sense of how well those requirements worked in the case of the Clean Air Act, the ones that are already in the law?

Dr. HIRZY. Senator, I don't. I have not conferred with anyone in that program and I don't have personal knowledge of that. I could investigate that and get back to you with an answer to that question.

Senator BINGAMAN. Okay. That's really all I have, Mr. Chairman. Thank you.

Chairman GLENN. All right. Thank you very much.

Our next witness, Mr. Gerald Yung, Vice President, Government Relations, for Mead Data Central. Mr. Yung, welcome to our hearing this morning, we look forward to your statement.

TESTIMONY OF GERALD E. YUNG, VICE PRESIDENT, GOVERNMENT RELATIONS, MEAD DATA CENTRAL,[1] ACCOMPANIED BY KENNETH B. ALLEN, SENIOR VICE PRESIDENT FOR GOVERNMENT RELATIONS, INFORMATION INDUSTRY ASSOCIATION

Mr. YUNG. Thank you, Mr. Chairman, Senator Bingaman. I am Jerry Yung, Vice President of Government Relations with Mead Data Central. MDC is the publisher of the LEXIS and NEXIS electronic research services, and MDC is a subsidiary of the Mead Corporation, both of which are headquartered in Dayton, Ohio. We have a growing amount of regulatory material in our databases, and so I guess I have to say, like the gentleman from the first panel, that in a lot of ways we also make a business of this type of regulatory material.

Chairman GLENN. Has you business also tripled in the last 10 years.

Mr. YUNG. It has. Our primary materials were cases and statutes, but we have added a lot of regulatory decisions and administrative materials because of popular demand, and it is growing very fast, both in the Federal Government and the states, for that matter.

I am here today to testify on behalf of the Information Industry Association as the co-chairman of IIA's Government Information Policy Committee. Accompanying me is Kenneth B. Allen, IIA's Senior Vice President of Government Relations. We have already submitted a full statement to the Committee and I would like here just to briefly summarize our remarks if I could.

Chairman GLENN. Your entire statement will be included in the record.

Mr. YUNG. Thank you. Our focus is on the information dissemination provisions of S. 1742. IIA is pleased to support this important initiative to establish statutory information dissemination principles for the Federal Government. We commend Senator Bingaman for taking the initiative in moving Congress closer toward writing these principles into law. We also thank you, Mr. Chairman, for holding these hearings and giving us the opportunity to participate.

The IIA represents 850 leading companies pursuing business opportunities associated with the creation, distribution and use of such information. The U.S. information industry is one of the fastest growing sectors of the economy and dominates the world information industry, but the industry's most important contribution, we think, is the role it plays in fostering the free and diverse flow of ideas and the right of citizens to create, acquire and use information without fear of Government intervention or control.

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[1] See p. 505 for Mr. Yung's prepared statement.

IIA is pleased to be here today to support the information dissemination provisions of Senate Bill 1742. These provisions accomplish three very important goals. First, they impose on the Federal Government an affirmative obligation to ensure the widest dissemination of public information, including electronic dissemination of such information.

Second, they set forth clear Congressional objectives to guide those public officials that are responsible for Federal information dissemination activities. And third, they place the final responsibility for information disseminations with each agency, which is important since these decisions must be made within the context of each agency's own particular statutory mandates.

IIA particularly supports the information dissemination provisions of S. 1742 that carefully balance the important roles that the Government and the private sector should play in the dissemination of public information. We support the provision that requires OMB to issue guidelines consistent with the goals and requirements of Congress, and we support the provision that lists the factors specifically that agencies need to consider in determining how to fulfill their information dissemination functions.

These factors include, among other things, considering whether equivalent products or services already exist before duplicating such efforts. We think this list of factors is especially important given the inherent scarcity of taxpayer dollars and the almost limitless possibilities for public information products and services. This type of analysis will help agencies decide on a case-by-case basis the most effective and efficient way to disseminate public information, thereby maximizing the investment of both private and public sources in developing and disseminating information products and services to the public.

We also support the provisions of the bill which require agencies to make public information products and services available to all on a timely and equal basis. And those provisions that require agencies to provide the public with advanced notice when they initiate, terminate, or make major changes to significant public information products and services.

We would also like to propose some additions to S. 1742, if we may. We urge the Committee to add language making explicit information dissemination objectives that in many cases we feel are already implicit in the bill. First, if disseminating information, the agency should ensure that no party, public or private, has the abilty to exercise monopolistic control of such information. By definition monopoly control of information denies the diversity of information sources that are essential to preserving the free flow of ideas.

Practices that diminish competition and diversity and may result in monopolies include proprietary like restrictions on the use of Government produced information, high initial charges for access, subsequent use charges such as royalties, and refusal to allow access in all available formats.

Second, although S. 1742 does require agencies to provide advanced notice to the public of significant actions concerning important public information products and services, it is silent on the content of the notice, and on the public's ability to participate. We believe that an agency's notice should advise the public of the benefits that the agency intends to achieve by its action, and provide the public with a meaningful opportunity to particpate.

Third, we feel very strongly that user fees for Government information products—that is, the underlying source material—should not exceed the marginal cost of providing copies of that information. Agencies incur the expense of creating information and operating information systems to fulfull statutory and programmatic requirements. Consequently, user fees should not reflect agency overhead or the cost of creating the information system, itself, but should be limited to the actual cost of copying and handling incurred by the agency in making available those requested copies.

And finally, the bill should make it clear that Federal agencies should disseminate information in all usable formats that they possess. This is particularly true and particularly important if the Government, itself, provides an electronic information product or service, because public access to the underlying information is necessary to encourage diversity and competition with that Government service.

To conclude, we believe that a few years ago a consensus in support of specific legislation would not have been possible. Today we are pleased to join with other segments of the information community in supporting the information dissemination provisions of S. 1742. We feel it is now time for Congress to enunciate the rules on these issues which are so important to our nation economically, politically, or socially. S. 1742 is an appropriate compromise, and we hope that the goals of this bill remain intact and that no significant changes to the bill are felt to be necessary. We urge favorable action by this Committee and Congress and appreciate the opportunity to present this testimony. Thank you very much.

Chairman GLENN. Thank you very much. In some ways your testimony deals with a very basic problem in S. 1742. The original Paperwork Reduction Act was supposed to prevent a lot of additional paperwork and unnecessary requests for information. Now we are into a slightly different area in overall information management, a field where the information available is expanding by quantum leaps almost weekly, or daily, in some cases.

Should we have a more comprehensive overall policy to manage information, as opposed to just preventing excess paperwork and excess forms going out for everybody to fill out? That is a problem that we have to deal with.

Now, you indicate that you support a strong OMB role and a strong role in information management for OMB. In this legislation that Senator Bingaman has put together, we are sort of heading in the other direction. We are decentralizing. We are saying that there have been abuses at OMB, for political or other purposes, and that OMB has tried to control what happens with the expressed legislative intent created on the Hill by the way OMB has managed the information flow.

Now, you were very favorably disposed toward OMB managing things, yet we are going in the other direction.

Do you favor this legislation then, in that respect?

Mr. YUNG. Yes, we do. There are so many possibilities for information dissemination, there is so much information in the Government—in our own particular services, for instance, we have 75 million documents, different documents, and we serve just one particular part of business in organizations.

It is very important that the Congress give guidelines to an agency, and OMB seems to be appropriately situated to be that agency that interprets and assists the individual agencies in deciding how to use the scarce tax dollars to maximum that information.

We also believe though that the individual agencies should have the final decision, that OMB should be the place where basic policy is brought together and interpreted as directed by Congress, but that the final agency decision should be at that level.

Chairman GLENN. OK. Let me put it a different way. Your business, really, depends to a large extent on this flow of information in providing these services to a lot of people that are the result of the paperwork problem that they have. You are addressing that problem in some respects.

How much in your own business, where you are required to fill out forms and so on in solving other people's problems, does this paperwork problem impact on you? Do you follow the distinction I am making?

Mr. YUNG. I do. I think it is a bigger problem for small businesses than it is for the larger businesses. Though large businesses have an enormous amount of paperwork filings that they have to do, they also have the size and scale that they are better able to do that.

We are in the position of being able to manage that, although some of it does seem duplicative. I also would respond to the comments on some of the forms that were required earlier on the earlier panel, pensions, for example. My own personal opinion there is that some things really should be regulated closely, and may be what is needed is more audit of such funds because they are so important to so many Americans. The problem is not necessarily paperwork, but instead, audit and follow-up to ensure that they are being run correctly.

But paperwork is a burdan to us, no question about it. I have even more sympathy for the very small businesses where it is an almost insurmountable burden.

Chairman GLENN. You made a point of hoping that the costs that would be passed along in the running of your business would only be the costs needed for reproducing whatever the information was, not to include the cost of how that information was initially collected.

We haven't tried to deal with something like that in this legislation, of course, but I think you may be bucking the tide on that. A well-known person in Washington has said, "Read my lips, no new taxes". User fees, of course, are being used as new taxes, whether we call them that or not. That seems to be the trend and we don't try and deal with that directly in this bill. I can understand your concern with it, but I am not sure we want to get into the taxation versus user fee area in this particular piece of legislation. We would be entering a whole new swampy area which is in another Committee's jurisdiction.

Thank you. Senator Bingaman.

Senator BINGAMAN. Thank you, Mr. Chairman.

The authority that OMB has to manage information and oversee the dissemination of information from the Federal Government is authority that was in the law that has now expired. It will continue in this law that we are proposing, and in that sense we are not in any way trying to downgrade OMB's ability to perform that function. If anything, we are trying to heighten the significance of that responsibility in this legislation.

Is that your understanding of it?

Mr. YUNG. Yes, I think so. Our feeling is that what is being done in this legislation is to focus the guidelines that are necessary, that some of the problems that people have identified have come about because of the lack of those guidelines. Now it is possible to be more specific, and so I believe that the effect of this legislation actually would be to better equip OMB to be able to assist agencies. And so they would actually be better off with this type of guidance.

So I see this actually as a strengthening, a capability, and that would be a positive move.

Senator BINGAMAN. Do you have any views on the specific proposal in 3511, Section 108, on establishment of the Federal Information Locator System and the provisions that we have in there? Is that something that you folks have taken a position on?

Mr. YUNG. I would defer on that to Ken, if he has a comment.

Mr. ALLEN. Senator, we have not taken a specific position on that, but certainly we would support anything that would eliminate duplication and redundancy in Government information collection requests.

Senator BINGAMAN. Okay. Let me ask about the quality of information that is being collected at the Federal level. In the testimony we heard last summer when we had a couple of hearings on this subject, some witnesses expressed real concerns about the deterioration in the quality of Federal information that was being collected. Is that something that is of concern to your organization? And if so, do you think we are doing what we should be doing to try to address that?

Mr. YUNG. It is not something that my particular company sees, because the type of information that we deal with—case decisions, regulatory and so forth—there is no deterioration in that type of quality. There may be a deterioration in the broader type of information that is often collected. And partly I think if there is it may be because of the lack of clear guidelines that have existed in the past, because this has been an evolving process. Ken may want to add something to that.

Mr. ALLEN. Senator, as we testified earlier when we had the opportunity to appear before your Subcommittee, yes, we are very concerned about the quality of Government information. We believe that diminishing resources, lack of attention by many Federal managers to the value of information has unfortunately resulted in perhaps a multiplicity of information, much of which is of limited value. And we think that the activities of this Committee and the reauthorization of the act and other attention by the Congress is one of the many issues needed to emphasize the importance of improving the quality of Government information.

Senator **Bingaman**. We had a discussion yesterday with Mr. MacRae about the suggestion that we were going to put the word "benefit" into this statute, so that we would not just talk about the burdens of Federal information on the private sector, but also allude to the fact that in each case you need the balance of burden against potential benefit from having the information.

I gather from your testimony that this is not a change—the addition of the word "benefit" is not a problem from your point of view because essentially your business is to take Government information and disseminate it for whatever benefit the private sector sees in it.

Mr. **Yung**. Right. We see that as an appropriate task, both in terms of collection of that type of information from the private sector and the Government activities to disseminate that information. In both cases it should be a case-by-case benefit versus cost type of analysis.

Senator **Bingaman**. That's all I have, Mr. Chairman.

Chairman **Glenn**. Thank you. Senator Roth.

Senator **Roth**. Mr. Chairman, I have no questions of the two witnesses here. I would just like to make a brief comment and ask that a statement of mine be included.

Chairman **Glenn**. Without objection it is so ordered.

OPENING STATEMENT OF SENATOR ROTH

Senator **Roth**. Mr. Chairman, let me say this. I think that the reauthorization of the current legislation is of critical importance. I continue to believe that the paperwork reduction legislation that was enacted in the 1980s has been continued to be of critical importance. I am concerned that while we talk a great deal about paperwork reduction, Congress, possibly not only through this legislation but others as well, is greatly increasing the paperwork burden. I think what we do here will be a very good example of how serious we take the problem of U.S. competitiveness in global markets.

I notice that Mr. Eizenstat in his prepared testimony indicated that the paper burden is still very costly and very expensive. I think this is a factor in the degree to which we are being competitive with other countries. There is a place, obviously, and a need for paperwork requirements. The real question is where we draw the line, and I am concerned that, despite the rhetoric to he contrary, in fact we appear to be opening the door to more and more red tape. I hope I am wrong and that is not the case. But I would appreciate my statement being included as part of the record.

Chairman **Glenn**. It will be included in the record.

[The prepared statement of Senator Roth follows:]

Prepared Statement of Senator Roth

The Paperwork Reduction Act has contributed significantly to our efforts to reduce the burdensome federal reporting required of American citizens. Whether we consider its effect on those in the private sector or those in local government, it is clear the very existence of the Act and OIRA as the enforcing agent has helped to create a level of consciousness and concern about paperwork requirements that did not exist prior to the creation of OIRA.

The Executive Branch has historically reported that it has substantially surpassed the Act's burden reduction goals. Obviously, the effects are difficult to measure. However, recently, a visitor in my office meeting on this subject indicated he was confident that OIRA had played a key role in containing the increase in paperwork requirements. Like that individual, I share the opinion that OIRA provides a valuable protection from excessive reporting requirements and that OIRA should continue to be authorized.

It is with this belief that I join with Senator Rudman, the ranking member of the Subcommittee on Government Information and Regulation, in introducing a simple reauthorization of OIRA. I have not seen or heard anything to convince me that the 1986 amendments or the original 1980 Act are not working, and feel that this is the best way to ensure that the current public protection remains intact.

In 1986, similar issues to those facing us today were raised as to the executive branch's use of OIRA in the review of an agency's regulations. The Congress, after hearings, enacted strong, comprehensive provisions. This bill extends those amendments and the original provisions of the Paperwork reduction Act. I believe, on the whole, the Paperwork Reduction Act provides important protections for small Business, State and local governments, and the general public from unnecessary, intrusive and costly Federal paperwork.

It's important to remember how far we have come in the effort to eliminate unnecessary Federal forms and red tape. The Federal Reports Act of 1942, the predecessor to the Paperwork Reduction Act, was enacted when the President and Congress came to recognize that the Federal Government was imposing requirements on the private sector that, in many cases, were counterproductive and costly to the national economy. The '42 Act established for the first time a Federal policy for controlling paperwork. It created a formal mechanism for review and approval of all reporting requirements by the Bureau of the Budget, later OMB.

This Act also had numerous gaps and limitations. It contained no enforcement mechanism to ensure that forms were in fact scrutinized and that those which were unnecessary were eliminated. The Act's scope was unclear in several respects, and it contained explicit exemptions for many kinds of forms, such as tax and financial forms, which constituted over half of the public's reporting burden. Over time, the Act was weakened further by legislative enactments excusing selected categories of forms and reports from control.

Congress began to realize that the existing methods for controlling paperwork were ineffective and in 1974, created through legislation a commission on Federal paperwork. This commission was chaired by Congressman Frank Horton of New York, and included Federal and State Officials and representatives of business labor, and consumer groups. The commission prepared reports covering such issues as tax policy, education and procurement. It made nearly 800 recommendations for reducing federal paperwork. The commission's final report, issued in 1977, found that the total cost of Federal Paperwork might well exceed $100 billion annually, and that a good deal of the cost was unnecessary.

Following the commissions report, the Governmental Affairs Committee held extensive hearings on the paperwork problem which resulted in the passage of the Paperwork Reduction Act of 1980. The Act, for the first time, made sure that all kinds of Federal paperwork had to be scrutinized by Federal Agencies to ensure that duplicative, unnecessary or excessively burdensome forms were eliminated. It required that every Federal Agency, including previously exempted agencies like the IRS and independent regulatory agencies eliminate needless red tape and that all Federal paperwork requests be reconsidered every three years.

Chairman **GLENN**. Thank you very much gentlemen. We appreciate your being here this morning.

Our next two witnesses are Mr. Jerry Berman, American Civil Liberties Union, and Patricia Wilson Berger, President of the American Library Association.

Mr. Berman, we look forward to your testimony.

TESTIMONY OF JERRY J. BERMAN, AMERICAN CIVIL LIBERTIES UNION[1]

Mr. **BERMAN**. Mr. Chairman, on behalf of the ACLU I want to thank you for the opportunity to testify on the public information dissemination sections of S. 1742. As an organization committed to the public's right to know, we strongly support the dissemination sections of the legislation and join with other public interest organizations and the Information Industry Association in urging that they be enacted into law.

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[1] See p. 525 for Mr. Berman's prepared statement.

In our view, S. 1742 would establish progressive Federal information dissemination policy for the new era of electronic public information in which we live. From the public interest community to the IIA to the OMB, itself, there is I think a general consensus that current policy is obsolete. The public interest case for this can be briefly stated. Today, unlike when the Paperwork Act was first passed, the Government is increasingly disseminating information in other formats than published. It is disseminating databases through commercial fir~~ms, on~~ its own, using new technologies such as the CD Rom technology. And now, equally important, the PC revolution has brought the ability to use electronic information within the reach of all citizens.

In our view, this should enhance the public's right to know, yet over the last several years there are few examples of the Federal Government using its information technology imaginatively to serve democratic ends. One example is the EPA toxic release database which provides toxic release information to citizens on-line. But these examples are few and far between and it is our view that this is directly a result of the law as it now stands.

The Paperwork Reduction Act does set information management goals, but it has been narrowly focused, as Senator Bingaman pointed out, and I think you have, Senator Glenn, also. The laudable goal was to manage information for the Government to make it less costly and more efficient. Under Government circulars, A-130 for example, there was an effort to make information dissemination conform to those purposes. The problem is that there was no underlying or additional commitment to expanding public access to information, and certainly when it came to electronic information the act is really silent. So OMB viewed its role as promoting the dissemination of electronic information, but as a discretionary function, something that they could do and encourage agencies to do, but as a means for saving costs or even earning a profit, rather than maximizing public access to information.

The result has been that agencies have been operating under a policy which discourages the Government from duplicating any private sector information service, even if the private sector information service is priced beyond what citizens can afford. There is no writ like we have under the Freedom of Information Act to develop fee waiver schedules when it is appropriate to ensure Government dissemination.

There has been serious underfunding of the development of critical health and safety databases, and most Government money has been skewed towards the development of commercially viable Government databases such as the SEC EDGAR system.

Mr. Chairman, we believe that if enacted, S. 1742 would establish far-reaching and significant reform in this area. While it would still have the laudable goals of insuring or attempting to minimize the Federal paperwork burden, there is also an effort under this act to ensure the public benefit of information through the information process; to strengthen public access to information; to encourage agencies through guidelines and policy to ensure that public information products in all formats are available on an equitable and equal basis to all persons; and to maximize the timely usefulness and release of information.

In contrast with current law, Federal agencies, pursuant to S. 1742, would not always defer to the private sector in developing public information products. Section 104 requires OMB to develop guidance to maintain an affirmative Government role in dissemination of information. On the other hand, and at the same time, it maintains a proper balance by talking about the sharing of responsibility between the public and private sector to ensure a diversity of public and private information sources for Government information.

Under Section 104(E) specifically, the Government is required, when it thinks about publishing information, to only "consider" whether the private sector is producing an equivalent agency product or a product which meets the agency's dissemination goals. Under current law and practice, if a public information product would in any way duplicate a private sector information product, that agency is required to "defer" to the private sector, even if that private sector product does not meet its goals.

As we interpret the legislation as proposed, this would no longer be the case. An agency could consider whether a private sector product existed, still could go ahead, but could at the same time be encouraged to say let's not waste money, if that private sector product is serving the public needs.

So, for those reasons, we strongly support the legislation, and like IIA, we urge amendments to make some of the provisions more specific as provided in the House counterpart to this legislation.

In conclusion, Mr. Chairman, we also share some of the concerns of the library community and other public interest organizations who worry about expanding the role of OMB, given their record of reducing access to Government information over the last 8 years. There is considerable reason for concern. However, we cannot ignore the fact that OMB does have a centralizing role in terms of setting policy guidance. That has continued over the last years. There is no will to change or to find an alternative for that, and in the absence of reform we will have the same policy, which is restricted public access to information.

Therefore, we do need the statutory change. We see this as redirecting OMB's guidance toward favoring public access to information, and we think it is absolutely essential that this legislation be passed into law.

In conclusion, I want to applaud you, Mr. Chairman, Senator Bingaman, and other members of the Committee and the excellent staff who have put this legislation together. We are anxious to work with you to ensure its passage into law. Thank you very much.

Chairman GLENN. Thank you. Ms. Berger, President of the American Library Association.

TESTIMONY OF PATRICIA WILSON BERGER, PRESIDENT, AMERICAN LIBRARY ASSOCIATION [1]

Ms. **Berger**. Thank you. I am very glad to be here this morning, Mr. Chairman, Senator Bingaman.

I have set out in my written statement our specific objections to certain portions of S. 1742, but let me say at the beginning that we understand what a difficult task you undertook when you attempted to tackle this entire area. Indeed, Mr. Chairman, you have pointed up several areas of lingering concern to you this morning which the association shares.

We think you have attempted to tackle an enormous series of troubling information policy issues, and we think that you have accomplished a great deal, and we are here this morning in that spirit.

We are primarily interested in the same area that Jerry just mentioned, and that is dissemination. We have agreed to disagree in that area, and I will be more specific later about it. But we understand that the bill is intended to cover a much wider range of Government information than those particular genre of concern to us, including the creation and life cycles of Federal Government documents and databases, rulemaking procedures and their end products, which has been a central focus, and further reductions of the paperwork burden imposed on the U.S. citizen.

We understand, therefore, that this bill as written will induce major change for virtually all types of Government information, whether that is the intent of the legislation or not. For this reason we believe the bill would err in giving OMB more dissemination authority than it presently has under the Paperwork Reduction Act. In a Supreme Court decision handed down yesterday, the Court overruled OMB's interference in agencies' information disclosure requirements. The Court said that, "Disclosure rules present none of the problems Congress sought to solve through the Paperwork Reduction Act and none of Congress' enumerated purposes would be solved by subjecting disclosure rules to the provisions of the act."

Similarly, control over information dissemination has not been a problem that Congress has sought to solve by legislation in the past. I understand, and the association understands, that you are attempting in part to solve that with this piece of legislation. It strikes us that OMB control over either information disclosure or its broader corollary, information dissemination, could be inimical to the way our society functions.

Let me say here what I wrote in my earlier statement. ALA believes that our citizens will be best served if dissemination decisions remain vested, and clearly vested, in Federal agencies and information dissemination oversight remains firmly in the hands of Congress.

For this reason, we believe that management of such information requires far more than a single piece of legislation or control mechanism. ALA believes that to work effectively, multiple Government information policies must be enacted to accommodate the broad spectrum of Government information uses, methods and purposes. The rapid and geometrical growth of Government information in electronic format must not give rise to a narrowing definition for the term "publication," and we feel that the legislation must address this issue much more specifically.

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[1] See p. 538 for Ms. Berger's prepared statement.

We must avoid a definition which, as Jerry suggested earlier, would exclude public access to Government information in electronic format. While I am certain that some knowledgeable and well-meaning people could and would argue that the language of S. 1742 is comprehensive enough to forestall such a possibility, language such as "to ensure the greatest possible public benefit for the Government's information and provide for distribution to the Federal Depository Library all publications required," I would counter with a maxim we all have experienced at some time in the course of our career: "Just because you are paranoid doesn't mean they are not out to get you."

I think that is important to recognize. For this reason we ask this Committee to include language in S. 1742 specifically crafted to protect Government publications in electronic format by stipulating that such publications will be disseminated through the Federal Depository Library program.

Further, we believe that the language of Section 104(E), which covers information dissemination, needs to be strengthened to include statements like those found and objected to by earlier witnesses in the two sections of the bill which limit the controlling authority of the OIRA administrator to exercise control over the information agencies to accomplish their rulemaking tasks.

And, as I said in my written statement, ALA is prepared to offer specific language which we believe would better delineate the responsibility and authority of agency heads, both to formulate and to carry out information dissemination policies. It is true the bill limits OMB's authority to interfere with information collection for rulemaking purposes, but it fails, unfortunately, to supply comparable language to safeguard agencies' right to disseminate information to the public.

As to the six factors that an agency would be required to consider before disseminating information to the public, we recommend that they be struck entirely. As written, this subsection could be used to delay substantially or to block altogether agency dissemination initiatives. In summary, such actions could be counterproductive to the national interests. Congress continues to urge Federal agencies to transfer expeditiously what they know and what they learn to outside organizations, industries and institutions. On more than one occasion Congress has berated agencies for not releasing quickly enough information they have either created or collected.

Why then install a technology transfer information break in this bill? Surely concerns about our Nation's productivity, and the lack therefore, continue to be ominous and very disquieting. Which brings me to the two undergirding principles I included in my written statement, that the Government has an affirmative obligation to disseminate information to the public, that access to Government information is the public's right, and therefore should drive the objectives and goals of all Government information policy.

ALA believes these principles are best met when Congress retains for itself oversight over the formulation and implementation of the Government's information policies and practices. And Mr. Chairman, let me say to you, I am no more anxious than you are to appear again. Twenty years sounds wonderful, but I don't think it will work. No useful national purpose, it seems to us, can be served by delegating additional oversight authority to OMB. Indeed, OMB has a past record of preempting agency decisions via the reporting requirements which derive from the two Executive Orders mentioned earlier this morning.

One can construe this bill as attempting, if one were in OMB, to codify parts of those Executive Orders, and that is what is scary. The Senate must include in this bill explicit language which limits OMB authority and confines its involvement in agency policy practices. In 1822 President James Madison had this to say about the importance of information to a free people: "A popular Government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives."

ALA believes that S. 1742 can do much to assure citizens future access to the popular information Madison defended. We believe that the changes and additions we recommend can strengthen the bill in ways which would make it durable, equitable information policy legislation for Government and citizens alike. We have developed specific language to achieve these changes, and I intend to enter them with my written statement in the record, if I may, Mr. Chairman. We are going to ask your indulgence while we have the language retyped, but we will get it to you.

We would be pleased to work with you and your Committee staff before you markup S. 1742. I should also mention here this morning what you already know, Senator Glenn, and that is, you received a letter dated the 20th of February from the President of the 52 Chief Officers of State Library Associations throughout the country endorsing ALA's position on this bill.

Thank you very much.

Chairman **Glenn**. Thank you very much.

Mr. Berman, I would like to explore how far you think information dissemination policy should go. Your written statement makes a very strong case for dissemination of information to the point where I wasn't quite sure whether you thought we should be collecting information just to provide a databank, in other words an electronic library, or whether you are talking about the release of Government information that is garnered to carry out Government requirements under the law.

Mr. **Berman**. Well, it certainly goes beyond Government collection of information. The dissemination—well, the regulatory side and the paperwork burden side deals with this collection issue. The dissemination section deals with all Government information that is in its possession, whether it has been collected, generated, or produced, and which the Government considers public. We are not talking about classified information, but public information. And in that realm, what are the Government's responsibilities to disseminate it and make it publicly available to its citizenry.

In the past there has been a wide-ranging program of making it available in published and paper formats. Increasingly now the most useful version of information is electronic, whether it is the electronic publication, or a database. And we believe that the Government should affirmatively explore making that information available to citizens on an equitable basis.

Chairman GLENN. But your statement was strong enough that I thought maybe you were going beyond just making government information available, and that you wanted to really be a promoter of——

Mr. BERMAN. Yes, I think——

Chairman GLENN [continuing]. Which would be an expensive and a different kind of operation.

Mr. BERMAN. I think that the consensus is that in many circumstances the Government should actively disseminate information. It shouldn't do it all by itself, but it should work with the private sector to ensure that Government information is out there in the most efficient and effective way. It has a job to disseminate public information and inform the citizenry. That doesn't mean all information, but when agencies consider how and when and how we are going to use information, it should think about democratic values and public access to that information.

Chairman GLENN. You also mentioned private sector sources of information. Can you give some examples of that, because up until now I hadn't thought that there were many privately run databanks out there that we would want to base government decisions on and that were available to provide most of the information the Government would want.

Mr. BERMAN. Well, Senator, this is an astonishing revolution that has happened. For example, Mead Data was just testifying. They take an enormous amount of Government data that we rely on as citizens, whether it is statutes, laws, regulations, and then there are other examples, the Congressional Record, the Federal Register, publications, and put it into electronic format.

Chairman GLENN. I am not quite sure I follow this. Do you have a specific example? Is there a databank that is from a private source for environmental regulations, or for health and safety regulations, or for tax law, or whatever, that we can rely on as a databank for changes in government policy?

Mr. BERMAN. No. It is not to rely on. For example, when EPA makes toxic release information available, it is in that specific program saying we have passed a statute that guarantees the public's right to know about what toxic chemicals are in their community. We collect that information, we have got to make it available. What Congress did in 1986 in the Superfund law is say, we want you to use the new electronic technologies to make it available to local communities, so put that information in a database and put it out on-line so that citizens can use that.

Chairman GLENN. Maybe I was misreading you then. I don't disagree with that at all. I thought you were saying that there are available databases in the private sector, and therefore, we don't need to duplicate them in the Federal Government.

Mr. **Berman**. No, quite the contrary. I was saying that it has been the policy under OMB, and trying to save money, to view all databases——

Ms. **Berger**. He is a very athletic guy.

Chairman **Glenn**. She feels that sitting beside you with your gestures is making her an endangered species.

Mr. **Berman**. We are about to really disagree on this legislation. [Laughter.]

We have been having a fight with ALA over this legislation. It is going to break out into a real fight. Sorry.

Ms. **Berger**. That's all right. I'll settle with you later.

Mr. **Berman**. That's ominous. I am sorry, I have lost the question. Where are we?

Chairman **Glenn**. I did too, I am afraid. Oh, private versus public data.

Mr. **Berman**. Well, the Government has been viewing the development of electronic information as something that is discretionary, that the real public access right is satisfied if you give citizens paper. That's the Freedom of Information Act, that's where the law was in 1980.

In many cases that may be adequate, but I think that in order to have equity of access to information as the business community, the scientific community and others are increasingly using the electronic version of information to make decisions, the Government has a responsibility to try and equitably decide which databases of welfare information, criminal information, and so forth, that ought to be available to citizens so that they can make decisions and hold the Government accountable.

I am certainly not saying take all the files in the Government and put them into databases, because that would violate our privacy principles. But when it is public information, use the technology, explore the benefit, and as part of your information resource management consider how to mix public and private dissemination, electronic and published formats, to expand democratic values in the access to information.

Chairman **Glenn**. Ms. Berger, you are President of the American Library Association. Do you agree, or do feel we should go beyond that and do something like people have proposed in the past, making an electronic Library of Congress where any school in the country can punch in a code and access information on a much wider basis?

Should we be proceeding along that line as opposed to just inputting individual services?

Ms. **Berger**. I am so glad you asked me that, but I would like to respond to something Jerry said earlier, if I may.

I would like to point out to the Committee, to you, Mr. Chairman, and you, Senator Bingaman, that you have your best possible model for transfer of a database from the "public to the private sector in WESTLAW." If I am not mistaken, West Company continues to codify the statutes passed by the Congress into the United States Code, and it is that body of information they have put online.

It now is available electronically. That kind of symbiotic relationship has existed between that company and the Congress of the

United States for at least the last 60 years, and I would commend to you that that's an admirable model for accomplishing many of the things that both IIA and Jerry have mentioned here.

Chairman **Glenn**. Wouldn't we be going a lot further though if we did that with libraries in general, where data that come out of the Government are made available, and any kid in high school could punch up the data they needed?

Ms. **Berger**. You have done that.

Chairman **Glenn**. Well, we haven't done it to the extent I'm talking about.

Mr. **Berman**. Senator, we haven't done it.

Ms. **Berger**. Your name isn't Pat.

Mr. **Berman**. Excuse me.

Ms. **Berger**. Fine. Thank you.

Chairman **Glenn**. Let Ms. Berger finish.

Ms. **Berger**. First of all, in the National Library of Medicine, in the National Agricultural Library, that is exactly what you have done, and both of those models have worked very well.

What has not been attempted is a similar model for the general public. I would caution against a wholesale application of electronic principles, primarily because I have been in the business of devising and building databases for well over 25 years now.

In fact, I have recently created one for my own agency, because we having missed out on two Nobel prizes because of our rotten corporate memory. I know as well as I'm sitting here that somebody in the private sector is going to come in later and say, look what they are doing with tax money. Well, the fact is nothing comparable is out there.

So I think there are ways for these kinds of models to be created and be useful, and I think we have the paradigms in the Government now. Let me remind the Committee again that ORBIT, the SDC ORBIT system, which is now owned by a foreign company, bore the name "ELHILL" in the National Library of Medicine. ELHILL stood for "Lister Hill".

My point is there has always been that kind of a relationship. So you are not inventing the wheel. The danger of this legislation as we see it is its very comprehensiveness, and this is why we would oppose a longer reauthorization time, for example, than the 2 years stipulated in the legislation.

I think you've got a bear by the tail, and I admire you for trying to tackle that bear, but I think it is going to take a lot of work by a lot of people over time, and a lot of good will. That good will has not been too evident in recent months.

Chairman **Glenn**. My time is up.

Mr. **Berman**. Senator, just give me a couple of minutes to respond to Ms. Berger. The example that she comes up with, Westlaw, which is a private—essentially a private distribution of Government data, and you ask, why don't we disseminate it through the libraries? I think what she has come up with is an example of what we want to change. Maybe not for Weslaw, but as a policy matrix.

ALA's statement is replete with concern about the privatisation of Government information. They want an active public role to balance that out. You can't have it both ways. I think that WESLAW is not an example on which we should base public policy, that we want a more active public role in disseminating information. I thought that was what ALA stood for.

In addition, they say that the bill is giving more authority to OMB. Yet ALA's statement is replete with examples over the last 8 years of OMB interfering in the dissemination functions of every agency and skewing it away from public access to information. If that's true, how can they favor current law or the status quo over a statute which says, don't interfere, let agencies make the implementing decisions and our guidance from Congress is to ensure public access to information and equitable access to information.

I think they are misreading the intent of the statute and making a case in one part for changing the law and another part arguing as if current law if fine. I don't know which way they want it.

Senator BINGAMAN. Thank you, Mr. Chairman.

First, I have here some comments that the Office of Technology Assessment has put together, and with your permission, I would ask that we include them in the record.[1]

Chairman GLENN. They will be included in the record.

Senator BINGAMAN. They are an excellent analysis of the legislation. Mr. Fred Wood in particular has done an excellent job in working on these issues for us and we appreciate it.

Regarding the problem of dissemination, I understand the Library Association paranoia and I share that. Whenever it comes to OMB or big brother, I think that there is a danger in trying to centralize authority.

But what I understand we are trying to do here is to put an affirmative duty on OMB, or OIRA, to facilitate the dissemination of information. And for you to suggest that Congress should formulate—I think the words you used were that Congress should be responsible for formulation and implementation of information dissemination policies.

I will just tell you, speaking as one Senator who has spent nearly a year working on this one piece of legislation, we are not equipped to implement anything. I mean, we have trouble getting the Congress started at the first of the year and getting it finished at the end of the year, and we have to depend upon someone in the executive branch to coordinate agency activities if it is going to happen, because Congress cannot do that.

I can understand your concerns about OMB or OIRA having more authority, but I think what we are trying to do is what Mr. Berman suggested, which is put an affirmative responsibility on them to do something constructive in this area and give them a coordinating, facilitating role, and not by doing so impede the dissemination of information but instead promote it. I mean, maybe that is obvious to you as to what are are trying to do and you don't think we are getting it done. I am just saying that if we don't do something like what we are proposing here, I fear that we will have such a hodgepodge of different efforts at electronic information dissemination that it won't make sense to anybody.

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[1] See p. 730.

Ms. BERGER. Yes, sir, I understand what you are saying, and I certainly can appreciate why no Congress, no mortal body of men and women, would have the time in their lifetimes to implement and formulate every policy.

However, I do know also that Congress has from time to time, and I would assume in the future will, reserve to itself the decisions about how certain kinds of information would be disseminated to the public and handled. You did it in the case of standard reference data, for example. You have done it in the case of information which comes out of the Department of Energy. And those particular mechanisms are very different from the mechanisms this bill suggests.

We are not trying to make supermen and superwomen out of you. Indeed, we think with closer words in certain sections of this bill you would achieve much of what you had hoped to achieve. You are trying to do the impossible. That's our position. We think that some of it is doable, but we also think that given the past track record of OMB, there must be in certain sections of the bill far more stringent language than exists now, language similar to the language in the bill on rulemaking.

I would argue with Mr. Eizenstat on that particular effort. I have to look at how the old act—which ALA does not support and I don't appreciate Jerry saying we do—how the old act has been misinterpreted by OMB, and the extent to which, frankly, A-130 has been abused to cut back on agency program publications.

Senator BINGAMAN. Mr. Berman?

Mr. BERMAN. The final point, when the American Library Association said that Congress should reserve to itself some power, one of their amendments, the amendment that they proposed as an alternative to OMB guidance, is that every time OMB comes up with policy guidelines, for example, a new A-130, it would require a joint resolution of Congress to go into effect.

In our view, that's unworkable, subject to a veto from the President for interfering with executive functions, and something that would allow any Senator to hold any regulation—no matter even if it was to benefit the public—hostage by simply saying, I want unanimous consent before we bring the joint resolution on the paperwork dissemination functions to the Floor, and if you want to debate the budget, that's fine, if you want to debate the paperwork thing, let's do that, and the Senate would never act on these regulations, they would never go into effect.

Ms. BERGER. I don't think that was. That was our second choice. We offered two options. One was that option when it seemed appropriate. The other option was that final decision rest with the agency. And that would not require the kind of legislation Jerry is talking about.

Senator BINGAMAN. As I say, I think I understand your point of view, but I am concerned that it there is to be any kind of coordination of this dissemination activity, we almost have to have somebody who is directed to do that, so that we can at least call him.

I mean, the Congress' primary ability to be effective in this area is to pass a statute and then every couple of years bring somebody before the Committee and say, why haven't you implemented the statute. So that's sort of the job that we perform, and if we don't have someone we can bring before the Committee and ask them that, it is real tough to ever get any implementation.

Ms. **Berger**. I understand, sir. I am just interested in a tighter bridle, and I think it is possible to tighten it.

Senator **Bingaman**. Well, there may be some things we can do to tighten the bridle. We will sure look at that. Thank you.

Ms. **Berger**. In fact, I wouldn't object to spurs.

Chairman **Glenn**. Thank you very much for being here. That concludes our hearing. We will stand in recess subject to the call of the chair.

[Whereupon, at 11:25 a.m., the Committee adjourned subject to the call of the Chair.]

APPENDIX

Opening Statement

by

Senator Paul S. Sarbanes

before the

Senate Governmental Affairs Committee

on

February 21, 1990

Mr. Chairman, I am very pleased to join you today, in my capacity as Vice-Chairman of the Joint Economic Committee, in connection with S.1742, the Federal Information Resources Management Act of 1989. As you know, S.1742 would reauthorize the Paperwork Reduction Act, which expires this year, and in my view would significantly strengthen the provisions of that Act with respect to federal statistical policy. I want to commend our colleague, the Senator from New Mexico and Chairman of the Subcommittee on Government Information and Regulation, who is the principal author and sponsor of S. 1742.

The Paperwork Reduction Act vested broad authority over the federal statistical infrastructure in OIRA, the Office of Information and Regulatory Affairs in the Office of Management and Budget. Serious questions have arisen at various times over the manner in which OIRA has exercised that authority. My purpose today is to share with you some observations from the perspective of the Joint Economic Committee with respect to OIRA and federal statistical policy -- specifically, the controversy over the questionnaire for the census dress rehearsal -- which I hope will be helpful as you consider S. 1742 and move toward reauthorization of the 1980 Act.

I want to begin by emphasizing the importance which the Joint Economic Committee attaches to the maintenance of the very high standards that have traditionally distinguished our federal statistical programs. The JEC has a long-standing concern to see that these standards are not compromised. In many cases this is a problem involving highly technical issues in which the broader public perceives little apparent interest -- until, of course, statistical information which was previously taken for granted proves to be unavailable or unreliable.

The JEC itself is a major user of statistical data and is especially sensitive to the pivotal role played by accurate, comprehensive, timely and accessible data in policy-making. Full and reliable statistical information does not, in itself, constitute or even guarantee sound policy. Statistical data are not a substitute for good judgement when decisions are made, whether in the public or the private sector. Solid and timely statistical information is a critical factor, however, in the decision-making which makes sound policy possible. Never, in my view, has the country's need for good statistical data been more urgent than it is today.

The JEC's concerns about the pressures being brought to bear on federal statistical programs by OIRA was dramatically underscored by OIRA's actions in July, 1987, with respect to the questionnaire for the dress rehearsal for the 1990 census. On June 17, pursuant to the requirements of the Paperwork Reduction Act, the Census Bureau had formally submitted the proposed questionnaire to OIRA for approval. On July 24, more than five weeks later, OIRA invoked its authority under the Act to direct the Census Bureau to delete some 30 questions, or roughly one-third of the questionnaire.

The decennial census is of course a major source of information about the nation, and by comparing a census with its predecessor we can identify national changes and trends, thereby better enabling us to define and refine policy questions. In addition, the decennial census serves as the basis for numerous other important statistical surveys which are carried out over the decade following the census.

The census is anything but a hit-or-miss affair. It is developed carefully, over time, and the dress rehearsal plays a critical role in its development. Preparations begin literally years in advance of the date. Two questionnaires must be developed -- the "short form" which goes to virtually all households and the "long form" which goes to a smaller sample. For the 1990 census, which will be mailed out on March 23 and counted on April 1 of this year, preparations under the direction of the Bureau of the Census began in 1983. Discussions and consultations were held on a continuing basis. These involved federal agencies -- including OMB -- state and local governments and the public. In 1984 OIRA established, and subsequently chaired, the Federal AGency Council on the 1990 census.

In the 1984-1986 period the Census Bureau conducted a variety of census pre-tests. In every instance the form was approved by OMB. As late as May, 1987, when the Senate and House subcommittees of jurisdiction met to review the contents of the census questionnaires, there was no indication from OMB of concern or dissatisfaction.

The July 24, 1987, OMB directive to the Census Bureau was therefore as unexpected as it was sweeping. Under this directive, as I have indicated, the questionnaire would have been reduced by approximately one-third. Among the questions proposed for elimination were virtually all the questions relating to housing. In addition, the sample for the "long form" would have been very significantly reduced in size. The Census Bureau was directed to respond to the directive by August 7, or within two weeks.

It was in response to this arbitrary OMB action that I chaired a hearing of the Joint Economic Committee on August 7. At that hearing then-OIRA administrator Wendy Gramm described OMB's July 24 action as merely one of raising questions in "staff-to-staff" discussions. The Census Bureau saw it very differently, however, and said in a published statement that OMB had "informed the Census Bureau that roughly 30 questions [would] be dropped" from the questionnaire.

The August 7 hearing put on record the widespread concern, indeed alarm, of decision-makers in the public and private sectors over the probable adverse consequences for the 1990 census of the OMB directive. At this point I would ask to have the full August 7 hearing record included in my formal submission, because that record includes the dozens of communications received by the JEC from data users all over the country; it reflects, among other things, the breadth of concern among state and local governments.

I wish I could conclude by saying simply that after the JEC hearing, OMB reconsidered its July 24 action and agreed to the recommendations of the Census Bureau. (As I have pointed out, over the years OMB itself had contributed very significantly to the formulation of those recommendations). This was unfortunately not the case. The dress rehearsal was carried out on March 20, 1988, with three questions completely deleted, others transferred from the short form to the long form, and with the sample size severely restricted.

Nine days later, as public concern again mounted in the wake of the dress rehearsal, I and 29 of my colleagues of both parties and in both House wrote directly to the President. Our letter took no position on the contents of the questionnaire but urged the President to assure that the questionnaire for the 1990 census would "reflect the best professional judgement of the Census Bureau." Shortly thereafter OMB agreed to a questionnaire that in the opinion of the Bureau met that fundamental criterion. In the end, therefore, the "best professional judgement" of the responsible statistical agency was vindicated and upheld, and the integrity of the decennial census was preserved. But the nine-month controversy was unnecessary, harmful and costly.

Mr. Chairman, I want to make clear that roughly a year following the census controversy, a significant reconsideration of statistical policy appears to have taken place within OIRA as personnel has changed. The controversy remains pertinent, however, because it illustrates the manner in which OIRA has exploited its authority under the Paperwork Reduction Act to justify arbitrary interference in statistical matters. S. 1742 goes far to minimize the likelihood that such interference will recur. I applaud the efforts of this committee to move forward with legislation that will create a constructive framework for federal statistical policy at a time when it is urgently needed.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT
OF
JAMES B. MACRAE, JR.
ACTING ADMINISTRATOR AND
DEPUTY ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
FEBRUARY 21, 1990

Mr. Chairman, I am pleased to be here today to discuss S. 1742, the "Federal Information Resources Management Act of 1989." This bill would authorize appropriations for the Office of Information and Regulatory Affairs (OIRA) in OMB to carry out the Paperwork Reduction Act of 1980. This bill also instructs Federal agencies and OMB to improve the collection, management, and sharing of Federal information in a number of ways.

OMB Director Darman recently sent you formal comments on this bill. Our letter discusses in some detail a number of different concerns that we have with S. 1742. Rather than repeat them all here, I would like to make some general observations. The letter is included as part of this formal statement.

My first observation is that this bill has both desirable and undesirable features. We are anxious to work with you to build upon the many improvements in current law that the bill contains. However, certain of its provisions are, in our view, so seriously flawed that the President's senior advisors would recommend that it be disapproved if it were presented to him in its present form.

As to the desirable features, S. 1742 appropriately recognizes the increasing importance of information as a valuable Federal resource and the need for the Federal Government to give increased attention to its management.

In particular, its provisions related to information dissemination, sharing, privacy, security, and records management highlight areas where a special focus is required. In this bill, for the first time Congress proposes to set forth a policy framework stipulating how all Federal agencies should behave with respect to information dissemination. In the Freedom of Information Act and other legislation, Congress has addressed access to information, how agencies should act when the public requests information. S. 1742 proposes to instruct agencies concerning their responsibilities for actively sharing information, over and above requests from the public. This is a major step forward and will greatly assist OMB in discharging its general information policy functions under the Act.

We also support the bill's amendments to language respecting the Federal Information Locator System. Many parties inside and outside of government now agree that a government-wide inventory of information products would be beneficial to the agencies themselves as well as to the public. Just how to go about constructing a truly useful inventory is a matter deserving careful examination. S. 1742 bill provides for an inventory and authoritative register of information collection requests while recognizing that the feasibility and means of accomplishing a more comprehensive inventory of information products will require further study.

OMB also supports the bill's provisions with respect to the management of public records and the Privacy Act. We have suggested certain technical corrections to the privacy provisions. We agree that records management, an aspect of information resources management, deserves the strengthening S. 1742 would provide.

Two of the most objectionable features of the bill are the following:

First, new Sections 3506(d) and 3518 would require that OIRA maintain a "public file" of all communications regarding any OIRA review while deliberations with the agency were occurring and regardless of whether the communications were deliberative and predecisional. These disclosure and review provisions would apply to a wide range of activities engaged in by OIRA staff, including procurement, telecommunications, statistical policy, and information technology functions, as well as budgetary, legislative, and program oversight support of OMB generally.

These provisions would also place greater constraints on the Executive Office of the President than on the agencies that report to the President. They are contrary to the principles that work fairly well in connection with the Administrative Procedure Act and the Freedom of Information Act. The Department of Justice believes these provisions would strike at the very heart of the President's constitutional authority over agency rulemaking by opening to public scrutiny deliberative materials generated as a result of the regulatory review process under Executive Orders 12291 and 12498.

Second, the separation in S. 1742 of OIRA's budget and Administrator from the rest of OMB needlessly fragments, in our view, an already small OMB. OIRA has the task of coordinating the efforts of all other parts of OMB in the areas of paperwork reduction, information technology, regulatory review, statistical policy, and the development of information policy. Separating OIRA from the rest of OMB would make orderly management of these issues impossible, and eliminate OIRA's ability to assure integrated review among each of these areas.

Rather than detailing our concerns, which are described in the letter, I would like to make some general historical observations. OMB's statutory authority to review and to approve or disapprove collections of information by Federal agencies began in 1942.[1] As to this paperwork clearance function, the OMB review program has not changed in any basic way.

To quote the Federal Reports Act of 1942, it was then, and still is, the policy of Congress that "information ... needed" by Federal agencies "should be obtained with a minimum burden upon business enterprises (especially small business enterprises) ... at a minimum cost to the Government". "[A]ll unnecessary duplication ... should be eliminated". "[I]nformation collected ... should ... be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public."[2] OMB was then, and still is, authorized to disapprove an agency's collection of information if the OMB Director finds that "the collection of such information ... is unnecessary, either because it is not needed for the proper performance of the functions of such agency or because it can be obtained from another Federal agency or for any other reason".[3]

Over the past 48 years, the original statute has been amended, and the program has grown--but, I submit, quite slowly and only after careful and deliberate consideration. In 1965, Congress enacted the Brooks Act giving OMB a central role in managing information technology. In 1974, it enacted the Privacy Act and established the Commission on Federal Paperwork.[4] In 1977, the Commission on Federal Paperwork, chaired by Congressman Frank Horton and Senator Thomas J. McIntyre, issued its recommendations. These recommendations led to the overall revision of the Federal Reports Act of 1942 that became the Paperwork Reduction Act of 1980.

As its first basic change, Congress strengthened the OMB paperwork clearance function in 1980. OMB's review authority was expanded, by statute, to include recordkeeping requirements, and to include information collections contained in regulations. Congress also added the "public protection" provision that prohibits an agency from subjecting any private party to a penalty "for failing to maintain or provide information to any agency" that has not obtained OMB approval under the Act.[5]

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[1] The "Federal Reports Act of 1942," P.L. 77-831 (December 24, 1942).

[2] Sec. 2, P.L. 77-831.

[3] Sec. 3(d), P.L. 77-831.

[4] P.L. 93-556 (December 27, 1974).

In 1980, Congress also codified a "sunset review" principle that had long been implemented by OMB (and GAO, when it shared paperwork oversight responsibilities with OMB), and that had then been adopted by Presidential Executive Order.[6] Under this procedural safeguard, OMB cannot approve a collection of information for a period in excess of three years. This restriction forces agencies to (1) resubmit periodically each ongoing collection of information for OMB review, (2) give notice to the public of agency and OMB reconsideration, and (3) invite the public and respondents to suggest improvements or to point out unreasonable burdens.

In 1980, Congress also expanded the scope of OMB's review function beyond that traditionally covered by the Federal Reports Act of 1942 in order to strengthen information resources management in the agencies and OMB's counterpart oversight. Specifically, The Act established a single statutory and organizational framework, under which OMB was to develop Federal information policies and guidelines concerning Federal statistical activities, records management activities, privacy of records, interagency sharing of information, the acquisition and use of automatic data processing telecommunications, and information resources management in general.[7]

In 1986, Congress amended the Paperwork Reduction Act further. Congress clarified OMB's paperwork clearance function to make it clear that all information collections (whether or not they were contained in regulations) are to be treated the same in terms of the review process.[8] Congress also amended the Act to assure that the public has additional information about OMB's reviews of agency information collections to enable it to participate fully and meaningfully. Building on this statutory guidance, OIRA also amended its paperwork clearance regulations to require agencies (1) to include, in their Federal Register notice indicating submission of an information collection clearance package to OMB, an estimate of the average burden hours per response and--when seeking expedited OMB review--a copy of the collection of information; and (2) to indicate on each collection of information (or any related instructions) the estimated average burden hours per response, together with a request that respondents direct to the agency and OMB any comments on the form itself and the accuracy of the burden estimate.[9]

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[5] 44 U.S.C. 3512.

[6] Sec. 1-105, Executive Order No. 12174 (November 30, 1979). "Forms or similar requests for information shall be reviewed within two years after their initial issuance and then at least once every five years. Following review, they should be revised or abandoned to the extent they are not required to meet an agency's basic information needs."

[7] Sec. 3504(a) in P.L. 96-511.

[8] Unless circumscribed by the clearance procedures in 44 U.S.C. 3504(h), all the remaining provisions of the Paperwork Reduction Act apply to any collection of information, whether called for by a printed form, oral question, or proposed or current rule. These provisions include: the basic legal authority in OMB to approve or disapprove the collection of information; the public protection provisions; the minimum information that an agency must

The 1986 amendments also expanded agency information resources management responsibilities, and OMB's counterpart oversight role, to stress telecommunications, information technology, security of records, agency dissemination of information, and increased statistical policy and coordination functions. The Congress also passed the Computer Security Act of 1987 and the Computer Matching and Privacy Protection Act of 1988, expanding and refining OMB's responsibility for assuring the integrity and privacy of government information.

I have given this brief history to stress the basic continuity of OMB's paperwork and information oversight program. OMB's paperwork review process has been in place for nearly 50 years, has been long supported by Congress, and modified only slowly and after careful and deliberate consideration.

In Title II, S. 1742 appears to be taking this approach. It creates a "Commission on Federal Information" (Title II, pages 54-61) which is directed to consider issues relating to the substance and implementation of the Paperwork Reduction Act. S. 1742 would also amend Sec. 3514 in the Act to have GAO recommend any "changes in law or administrative improvements necessary to better achieve the responsibilities assigned under law, including those related to both the Office of Information and Regulatory Affairs and the agencies."

We support this approach. Many of the changes that the Paperwork Reduction Act of 1980 made to the Federal Reports Act of 1942 were supported by the 1977 recommendations from the Commission

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provide the public in its Federal Register notice to the public; the three-year limit on approval of a collection of information; and the legal responsibility of agencies to display the OMB control number.

[9] Amendments to 5 CFR 1320, issued in 53 Fed. Reg. 16618 (May 10, 1988).

on Federal Paperwork (established in 1974). Many of the issues raised by agency and OMB implementation of the Paperwork Reduction Act are complex and interrelated, and would well benefit from being studied by such a Commission and GAO.

I would point out, however, that Title I of S. 1742 appears to offer answers for the questions to which the Commission is asked to respond, thus prejudging the Commission's responses to the issues that Title II asks it to consider. We would suggest that the Committee consider converting the detailed provisions in S. 1742 involving the collection and management of statistical and other Federal information into more general statements of information resources management policy, and that the Committee withhold any detailed statutory changes in these areas until the Congress has had an opportunity to consider the Commission's and GAO's recommendations.

I also note that S. 1742 would have the Commission issue its final report and recommendations in less than 18 months. This seems a little fast. After Congress creates this Commission, the Congress will have to appropriate funding, the President will have to appoint Commissioners, the Commission in turn will have to select and hire staff, and then conduct research and public hearings to evaluate the many complex and interrelated issues involved. As with the original Commission on Federal Paperwork, this would likely take at least three years after creation of the commission, rather than the less than 18 months now provided in S. 1742.

Extending OIRA's reauthorization to four years would allow the Congress, in the context of OIRA's next reauthorization, to consider in an orderly way the Commission's and GAO's recommendations and their impact on agencies' and OMB's paperwork clearance and information resources management programs.

I would also like to note that, at least in some ways, S. 1742's proposed changes to OMB's long-established information collection review process would run counter to the purpose and structure of the original Federal Reports Act of 1942 and its 1980 and 1986 amendments.

For example, despite the general agreement within Congress and the Administration that the agencies and OMB need to do more to reduce unjustified paperwork burdens on the American public, S. 1742 would virtually eliminate the "independent review" of ongoing paperwork that Congress viewed in 1980 as essential to reducing unjustified paperwork burden. It does so principally by adopting new and burdensome review procedures and by establishing a new standard for OMB to apply -- and for courts to review -- in deciding whether to have an agency improve the quality or reduce the burden of an existing information collection. This "arbitrary and capricious" standard appears to drop or supersede the long-established Paperwork Reduction Act principles based on need, practical utility, and burden.

Both in 1980 and in 1986, Congress stressed the importance of reducing the burden of the Federal paperwork inventory by defined percentages. Likewise, S. 1742 would direct OIRA to target a five percent burden reduction from existing information collections, particularly from the burdens imposed by "Federal procurement and grant programs."

Working with the agencies, we have since 1980 achieved a substantial reduction in paperwork burden -- in rough terms, a reduction of over 600 million hours in annual reporting to the Federal government. But Federal paperwork burden today is way up from what it was in 1980 -- by over 470 million burden hours.[10] Once new legislation or agency programs create new information collections, their respondent burdens become part of the existing paperwork inventory. Only through constant agency evaluation and OMB review of what is in the existing paperwork inventory can we reduce ongoing paperwork burdens on the public.

That is why President Carter's Executive Order No. 12174 (November 30, 1979) established a sunset review at OMB for both new and ongoing information requirements, a principle codified in the Paperwork Reduction Act of 1980. S. 1742 would undermine this long-established independent sunset review. While the bill stresses the need to share and disseminate information, it seems anomalous for it to limit effective Executive oversight to improve the quality and reduce the burden of that same information.

Mr. Chairman, under the Paperwork Reduction Act, agencies and OMB, working together, have improved the quality of information collected by the Federal government, and reduced unnecessary burden on the public. Over 90 percent of the paperwork imposed on the public today involves regulatory, procurement, grant, and tax reporting. The public continues to find Federal paperwork requirements overwhelming. For example, in 1987, OMB had to act strongly to simplify the IRS Form W-4, the "Employee's Withholding Allowance Certificate." Many complained that the W-4, which doubled in size from two to four pages, was much too complex. OIRA worked with IRS to develop a simplified, two-page W-4A, much to the relief of many workers.

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[10] The FY 1980 burden hour base was 1,276.3 million hours (Information Collection Budget of the United States Government, FY 1981, p. 1). The estimated FY 1989 burden hour base was 1747.5 million hours (Information Collection Budget of the United States Government, FY 1989, p. 29).

In a recent report,[11] GAO described how, as part of their assessment of the technical adequacy of OMB reviews, GAO had selected 17 "case examples" for an independent review by "three national experts." In essence, GAO asked these individuals whether, based upon the technical adequacy of the agency proposal, they would have approved or disapproved the agency's request, and GAO then compared the decisions of the experts with OMB's decisions on these 17 items. The results of the comparison are as follows:

- For the 7 cases that OMB disapproved, the experts would have disapproved 3 and approved 4.
- For the 10 cases that OMB approved, the experts would have approved 3 and disapproved 7.

The GAO report notes that 3 of the 4 cases OMB had disapproved were resubmitted and ultimately approved, resulting in an actual "disagreement" with the experts involving an OMB disapproval on only 1 case. On the other hand, the experts would have disapproved 7 cases that OMB approved--implying, at least, that OMB should consider exercising its paperwork review authority more stringently than it does.

OMB strongly supports authorization of appropriations for OIRA so that OMB may continue its ongoing work with agencies to improve their collection, use, and sharing of information, as provided in the Paperwork Reduction Act. We support the provisions in S. 1742 related to information dissemination, sharing, privacy, security, and records management, and the creation of the Commission on Federal Information. We appreciate the opportunity to testify, and request the opportunity to work with you to make S. 1742 a bill that can be signed into law.

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[11] Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability, September 1989, GAO/PEMD-89-20.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MAR 28 1990

Honorable Jeff Bingaman
Chairman, Subcommittee on Government
  Information and Regulation
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

After the Senate Governmental Affairs Committee February 21, 1990, hearing on the Federal Information Resources Management Act of 1989, S. 1742, you sent me some additional questions for which you requested my answers for the record.

I am pleased to respond to these questions, and would welcome the opportunity to discuss these or any other matters of interest to you.

Sincerely,

Jefferson B Hill for

James B. MacRae, Jr.
Acting Administrator
  and Deputy Administrator
Office of Information
  and Regulatory Affairs

Enclosure

cc: Honorable Warren Rudman
    United States Senate

Senator Jeff Bingaman's
Additional Questions for James B. MacRae, Jr.
Acting Administrator and Deputy Administrator,
Office of Information and Regulatory Affairs
February 21, 1990

1. OFFICE OF MANAGEMENT AND BUDGET

A. OIRA MANAGEMENT

1. You have been Acting Administrator, since the October departure of the past Administrator, Mr. Plager. When will a new Administrator be named? Why is it taking so long to name an Administrator?

Answer: A nominee to be OIRA Administrator is going through the White House clearance process now.

2. Have the views of other agencies been solicited on this legislation? How would you describe those comments received? Are they reflected in your testimony? Do you have any objection to submitting those written views received from agencies to the Committee?

Answer: The Senate Governmental Affairs Committee sought the views of a number of agencies concerning S. 1742. A few drafted responses. To the extent we were aware of these responses at the time I testified, substantive agency concerns were reflected in either my testimony, the letter sent the Committee by Director Darman on February 20, 1990, the letter sent the Committee by the Department of Justice on February 20, 1990, or the testimony submitted by the Small Business Administration.

3. You have indicated your opposition to the bill provision requiring a line item budget submission. Isn't a line item submission what already in effect occurs when Congress continues to single out OIRA's budget for an individual allocation? Wouldn't a line item give you the chance to make a case for adequate funding?

Answer: I do not lack opportunities at OMB to make a case for adequate funding of OIRA functions. On the contrary, I want to stress that it is very important for OIRA to remain a part of the OMB budget. As Director Darman wrote in his February 20, 1990, letter: "OIRA has the task of coordinating the efforts of all other parts of OMB in the areas of paperwork reduction, information technology, regulatory review, and as S. 1742 would appropriately initiate, the development of information policy. Separating OIRA from the rest of OMB would make management of these issues impossible and eliminate OIRA's ability to ensure integrated review in each of these areas."

In discussing this issue with me at the hearings, you expressed concern that OIRA has "a tremendous number of responsibilities, many of which are not being adequately handled and possibly one of the reasons is that you haven't been able to get the necessary funds to do that." The Paperwork Reduction Act directs agencies to manage carefully and efficiently their collection, use, and sharing of information; it is OMB's role to oversee agencies' accomplishment of these activities. OIRA's effectiveness in carrying out these oversight responsibilities depends on its being an integral part of OMB. Separating OIRA from OMB would, in practical terms, dilute the direct, public, paperwork oversight role of the OMB Director, thereby unnecessarily weakening OIRA's ability to carry out its Paperwork Reduction Act responsibilities. A line item could also weaken OIRA by making OIRA less effective in carrying out its mandated responsibilities for budgetary, testimony, and legislative review, which are not different in kind from its regulatory and paperwork reviews.

As a technical comment concerning an assumption stated in your question, OMB's budget now contains an "earmark" establishing an amount available to carry out the Paperwork Reduction Act; not a line item.

B. REGULATORY REVIEW

1. Many feel that safeguards are necessary to ensure that the institutional and integral role of OMB in the rulemaking process conforms with standards of public participation and fairness under the Administrative Procedure Act.

Answer: OMB, in carrying out its Executive regulatory oversight responsibilities, is not acting in ways inconsistent with the standards of public participation and fairness contained in the Administrative Procedure Act (APA).

The APA provides for the manner in which the public (including affected interests) can review and comment on an agency rule after it is proposed for adoption. The APA does not establish procedures for agency development of a regulatory proposal; in other words, the work leading up to the formal proposal is not controlled by APA procedures.

The regulated public, agency constituencies, and interested Members of Congress and their staff have long felt free and are legally permitted to meet with agency staff responsible for developing regulations and to discuss a possible rulemaking prior to any official notice of a proposed rule in the Federal Register. Moreover, they may do so in private, behind closed doors, without a record, without inviting others to attend, without any form of public notice, and without any possibility for public comment at that time. The scope of this practice is widely acknowledged:

> "In the practice of administrative law as it has developed over the years, there have been virtually no restrictions on communications with agency officials at the early stages of their consideration of a particular [regulatory] problem. Written information is routinely supplied, meetings are held at which the presentations are made by the regulated industry one day, and those on the other side the next, and the agency has felt free to discuss its tentative views about where a proposal is going and what the agency is considering with any interested group."[1]

Once the agency publishes its proposed rule in the Federal Register, the Administrative Procedure Act does apply. Under the APA, a regulatory decision--by statute, and consistent with Executive Order Nos. 12291 and 12498--is that of the agency head, and the decision must be based on the agency "record." The agency cannot rely on factual information that is not in the agency record to support its decision. Once a regulatory proposal is made, notice is given, public comments are received, and a "record" is compiled that provides a rational basis for the final rulemaking decision.

OMB regulatory oversight does not interfere with the public's ability to comment provided by the APA, nor with the agency's obligations to comply with the other provisions of the APA.

> "The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. ... The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking." (Sierra Club v. Costle, 657 F.2d 298, 405-6 (D.C. Cir. 1981); see also, National Grain and Feed Ass'n v. OSHA, 858 F.2d 1019, 1031, fn.22 (Fifth Cir. 1988)).

a. Hasn't OIRA, in its informal administrative agreement with the House, conceded to the need for safeguards against delay, ex parte communication, secrecy, disclosure, and accountability?

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[1] Alan B. Morrison, "OMB Interference with Agency Rulemaking: the Wrong Way to Write a Regulation." 99 Harv. L. Rev. 1059, 1068 (1986), quoted in footnote 68 at p. xliii of the 1987 Regulatory Program.

Answer: Since 1986, OIRA has implemented and complied with the June 13, 1986, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498, entitled "Additional Procedures Concerning OIRA Reviews under Executive Order Nos. 12291 and 12498 [Revised]." We are unaware of any evidence of serious problems relating to compliance with these procedures.

b. Do you disagree with the 1988 report by the Administrative Conference of the United States which concludes that: "There has been sufficient experience under the executive orders to justify statutory codification?"

Answer: This sentence to which you refer appears in a report to, not by the Administrative Conference of the United States (ACUS) prepared by one of its contractors.[2] This report was one of the documents considered by the Administrative Conference in deciding whether to adopt what became Recommendation 88-9, "Presidential Review of Agency Rulemaking," December 8, 1988 (1 CFR 305.88-9). The Administrative Conference did not agree with this statement by the contractor, and did not endorse the need for statutory codification. Moreover, inasmuch as the Executive orders set forth procedures by which the President carries out his constitutional responsibility to supervise the Executive branch, it would be inappropriate to codify these procedures in statute.

c. Do you disagree with another conclusion of the report which states that: "The informal agreement that OMB reached with its congressional oversight committees in 1986 did not establish a long-term resolution of the issues that had arisen during the Reagan Administration?" How will the long-term resolution of the new proposed agreement be better ensured?

Answer: The Administrative Conference did not agree with this statement by the contractor, and did not in its Recommendation 88-9 criticize the 1986 disclosure procedures. As I stated above, since 1986 OIRA has complied with these procedures, and we are unaware of evidence of problems relating to compliance with them. I thus do not agree with the premise of the question, which assumes that there is an issue that needs resolving.

2. Many feel that during the first ten years of OIRA operation, and certainly from 1981-89, that OMB regulatory review has been a controversial process having substantive and sometimes deleterious impact on the outcome of agency rulemaking.

a. Do you disagree with the observation that OIRA placed

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[2] Bruff, "Presidential Management of Agency Rulemaking," November 21, 1988.

deregulation as a priority of the office from 1981-89?

Answer: The period of intensive deregulatory activity at OIRA during the last ten years was from 1981-1983, when over 100 existing regulations were reviewed by the agencies, OMB and the Presidential Task Force on Regulatory Relief to determine whether regulations were still needed or could be made more cost-effective. Since then, OIRA's regulatory efforts have concentrated on assisting the agencies in developing new, better quality regulations. Certainly, the Code of Federal Regulations is not getting any smaller--every year, hundreds of new rules are promulgated with OMB's concurrence.

Under Executive Order No. 12291, we have tried to assure that the agencies develop regulations that are needed, that benefit society as a whole rather than just narrow special interests, that are more consistent across programs, and that are cost-effective, which means that they accomplish a given objective at the least cost. We also spend a great deal of time coordinating regulations between and among affected agencies. In doing this, we emphasize the importance of designing regulations, to the extent permitted by law, based on sound and carefully considered data and analysis. Two letters from OMB to agency heads discussing problems with two regulatory proposals should give you a good sense of the kinds of issues that we raise in the course of our Executive regulatory review (Attachment 1).

Let me note just one valuable result of the Order. Prior to 1981, the Federal government had no consistent standards for regulatory analysis. The quality, quantity and methodology of analysis varied tremendously from agency to agency and from rule to rule. This situation crippled attempts to assess the consistency, effectiveness and impact of Federal regulation. Since 1981, the analytical foundations for regulatory decisions have been harmonized and strengthened across the government, leading to better reasoned, better coordinated, and more effective regulation.

b. How do you respond to the observation that OMB delay and interference in rulemaking in areas ranging from asbestos removal to warning labels on children's aspirin (for Reye's Syndrome) supplanted the ultimate authority of agency mission heads for rulemaking?

Answer: As Executive Order No. 12291 makes clear, nothing in OMB's regulatory review procedures supplants the ultimate authority of agency heads to issue regulations. Sporadic criticism from agency staff about alleged OMB interference should not be equated with the position of agency policy officials.

For example, in the 1982 children's aspirin case that you cite, the Secretary of Health and Human Services at the time, Richard Schweiker, publicly stated that it was his decision not to issue a warning label for Reye's Syndrome (based in large part on the recommendation of the American Academy of Pediatrics) (See Attachment 2). Yet some continue to allege that an OMB career official made the decision, rather than the head of the agency legally responsible for making the decision.

Similarly, in 1988, then-head of the Occupational Safety and Health Administration John Pendergrass told Senator Kennedy in response to a similar question, "OMB is not 'substitut[ing]...its judgment relative to the content of health and safety standards over that of...[OSHA's] health scientists' when it questions the methodology used in our regulatory impact analyses, or when it asks about scientific studies we have not referenced, or feasibility issues it believes we have not adequately considered...When...we believe that OMB is in error...we insist on our position and we prevail."[3]

3. The GAO in its September 1988 report entitled Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability reported that, and I quote from Elenor Chelimsky's...testimony..."OMB's policies were inconsistently applied by office staff, reviews were slower than in earlier years, there was a large increase in the number of reviews exceeding legally authorized time limits, and some requests OMB approved were technically flawed...agencies' decisions about information collection requests were indeed influenced by OMB's policies and practices...(and) OMB's actions have been associated with a reduction in the availability of certain types of information since the early 1980s."

a. What is your reaction and response to these findings? Are they accurate?

Answer: We strongly disagree with these findings. Our concerns with the accuracy of these findings are detailed in the attached letter from this Office to Ms. Chelimsky (Attachment 3). We have, however, taken steps to implement several of the GAO recommendations to ensure that GAO's concerns do not become reality.

4.a. The agreement which OIRA has negotiated with the House and published in the Congressional Record on November 17, 1989 does not speak to the conditions of implementation. Please clarify for the Committee whether the agreement is already in place? If not, is its implementation conditional upon enactment of the House bill. Are any changes contemplated in the proposed agreement before it is implemented?

b. At the hearing you referred to the House agreement as simply a framework. What is the status of the agreement and is it

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[3] See S. Hrg. 100-719, pp. 808-809.

subject to change?

Answer to Both Questions: As I stated at the hearing, the House agreement constitutes a framework from which agreement might come. In the meantime, OIRA is adhering to the 1986 procedures. If you perceive problems with these 1986 procedures, we would, of course, be willing to discuss these procedures with you. Any agreement we reach and implement must, of course, be agreed to by the President and both Houses of Congress.

5. One of the few public records of OMB regulatory activity has been the publication entitled the "Regulatory Program." No such report was published in 1989. It is my understanding that a report was prepared, in fact part of it was used in an OIRA conference on January 16, 17, and 18th of this year. Why wasn't the report issued? Has OMB Director Darman eliminated this report from OMB's publications?

Answer: OMB did not issue the Regulatory Program of the United States Government for 1989 because agency draft submissions were completed before many senior appointees to this Administration were confirmed, and thus did not reflect the regulatory policies and priorities of the new appointees. As I point out in the attached December 4, 1989, memorandum entitled "The 1990 Regulatory Program," we asked agencies to prepare draft submissions for the 1990 Regulatory Program, and are now in the process of reviewing this material to prepare it for publication (Attachment 4).

The material that was released at the OIRA conference on January 16, 17, and 18 was a draft paper prepared by OIRA staff, not an agency submission, intended for possible use in the Overview that OMB has in the past prepared for the Regulatory Program. We are now in the process of considering whether an updated version of this paper should be included in the Overview for the 1990 Regulatory Program.

6. At the June hearings Senator Levin asked for a list of the oldest rules under OIRA review and Mr. Plager submitted a list of rules dating back to April of 1988 more than a full year. The letter also included a list of rules under review which had recently been approved and that list dated back to February of 1987, nearly 2 1/2 years.

a. Why is it that it takes more than a year to review a rule and in some cases more than 2 years?

Answer: OIRA reviews approximately 2,300 draft rules each year under Executive Order No. 12291. Our average review time for these rules during the past several years has been about 30 days. Approximately 50 percent of the rules submitted are reviewed in 10 days or less, and for nearly 80 percent review is completed in

30 days or less. Given the complex, difficult issues raised by many draft regulations, some rules will take longer to review than others. In many cases, the time a regulation is under review is lengthened by the time it takes the agencies to respond to questions or to make the changes the agency determines are needed. In other cases, interagency coordination may lengthen the total review time of a rule. In addition, in some cases, particularly during this past year, new agency decisionmakers have wanted to review or reconsider draft rules that had been submitted by their predecessors for OMB review. Finally, we would like to point out that for some agencies, substantial delays occur between the time OMB concludes review and the time the agency publishes the rules in the Federal Register. During 1988, for example, it took EPA, on average, 54 days to publish a rule after OMB clearance; for OSHA it took an average of 31 days.

b. What is the reason for the approval of the oldest rules just before the transmittal of the letter?

Answer: Review of the rules noted in Mr. Plager's letter to Senator Levin was concluded because OIRA completed its discussions with the agencies regarding their compliance with the principles of Executive Order No. 12291. The Director of OMB made it clear from the beginning of the Bush Administration that he would not tolerate delays in regulatory review. OIRA began its effort to expedite all reviews in process, particularly that had been in process for some time. The June hearing pinpointed some of these reviews, and OIRA immediately ensured their resolution.

c. How old is your oldest rule now?

Answer: Our oldest rule as of March 1, 1990 was received for review on May 10, 1989. It is a Bureau of Export Administration rule that has been undergoing extensive interagency discussion between the Department of Commerce and the Department of State.

d. How do you reconcile the fact that a review of a year or two years violated your own guidelines, articulated in the so-called Gramm memo of 1986 in which you state that all rules will be reviewed within 60 days?

Answer: The June 13, 1986, memorandum from OIRA Administrator Wendy Gramm to the heads of departments and agencies, entitled "Additional procedures concerning OIRA reviews under Executive Order Nos. 12291 and 12498 [Revised]", does not contain a guideline that all rules will be reviewed within 60 days.

e. What can we do to make the limits for review more enforceable so that delay is not used to kill or

significantly alter a rule?

Answer: Director Darman has testified that OMB will not use delay as a tactic to force agency concurrence with OMB views.[4] When time is legitimately needed to resolve important issues, however, we would be remiss in our duties by concluding review of a proposal without proper consideration of all relevant information and assurance of consistency with other regulation. We do not believe that there is a problem in this regard; in fact, as noted above, we have reduced the length of time our oldest rule has been under review from over two years as of June 1989 to eleven months as of now. We have agreed in negotiations with the House to limit OIRA review of a draft agency rule to 60 days, with the possibility of an extension of 30 more days, for reasons for such extension being placed in OIRA's public file.

C. TENSIONS BETWEEN REGULATORY REVIEW AND INFORMATION MANAGEMENT

1. Many times through the life of the PRA, Members of the Congress have maintained that while the PRA is intended to address information collection burdens created by regulatory requirements, its scope of review is to be limited to information management concerns and should not encompass substantive regulatory issues.

Likewise, the PRA created separate tracks for regulatory and non-regulatory paperwork -- in order to protect the integrity of the rulemaking process created by the Administrative Procedure Act.

Over the last nine years, however, many observers have criticized OIRA for failing to respect the differences between information management and regulatory reform, and between regulatory and non-regulatory paperwork. This, of course, has been in the context of OIRA's critical review of many health and safety initiatives.

Answer: Let me address briefly the allegations that have been made concerning OMB's use of the Paperwork Reduction Act to "target" health and safety-related paperwork, allegations that we categorically deny. This allegation is most prominent in an October, 1989, OMB Watch report entitled "Playing the Numbers. OMB and Paperwork Reduction: An Analysis of 1988 OMB Paperwork Decisions." In its report, OMB Watch states:

> "OIRA has targeted health and safety agencies for paperwork and regulatory relief. While OIRA has disapproved (or agencies withdrew) only 5.2 percent of all regulatory paperwork in 1988, health and safety agencies found their regulatory paperwork having much more trouble at OIRA. For

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[4] Hearings before Senate Governmental Affairs, S. Hrg. 101-474, October 5, 1989, page 146.

> example, EPA had four times as many of its regulatory paperwork proposals encounter problems with OIRA clearance." (p. v)

When we looked more closely at the OMB Watch Analysis, however, we discovered that the conclusions are based largely on selective presentation of the data. In the table presented by OMB Watch ranking 21 Federal agencies and Departments by the percentage of paperworks disapproved by OMB or withdrawn by the agency (p. 8), only two health and safety agencies are shown, EPA and OSHA. These two are at or near the top of the list, above the government average. OMB Watch concluded that "health and safety" agencies are targeted.

What is missing are the other health and safety agencies. OMB Watch does not include in its table (or otherwise mention in its report) the seven other health and safety agencies that have fewer paperwork disapprovals or withdrawals than the government average (Mine Safety and Health Administration, Food and Drug Administration, Consumer Product Safety Commission, National Highway Traffic Safety Administration, Animal and Plant Health Inspection Service, Nuclear Regulatory Commission, and Food Safety and Inspection Service). Using the OMB Watch logic, we could use these seven agencies to conclude that "OIRA is biased in favor of health and safety agencies," but that conclusion would also be unwarranted.

By the law of averages, some agencies will be high, some low. OMB Watch cited the two that were high, but did not tell its readers about the seven that were low. As a result, the OMB Watch "analysis" is misleading and its conclusions unwarranted. We have several other fundamental concerns with the quality of the OMB Watch analysis and errors of fact and presentation that we discuss separately (Attachment 5).

S. 1742 attempts to more clearly delineate the distinctions between the regulatory and non-regulatory information collection activities, for example, by creating explicit requirements for the review of paperwork required by current rules. It also would bring both the paperwork clearance and regulatory review processes into the sunshine with more explicit documentation and public access requirements.

a. Do you believe changes, such as those proposed in our bill, are necessary to better guide OIRA's review of agency information and regulatory activities?

Answer: Yes and no. OMB supports provisions in the bill that would streamline and strengthen the information collection review process and place greater emphasis on agency accountability for adhering to the standards set forth in the Paperwork Reduction Act. OMB also supports language on information dissemination policy that provides more definitive policy direction on information dissemination. As indicated in Director Darman's letter to Chairman Glenn, however, OMB opposes provisions that would impose procedural constraints on the exercise of OMB's oversight activities.

b. Do you believe the proposed changes, including the regulatory review time limits, do enough to control the apparent tendency of OIRA to get involved in the substance of agency regulatory decision-making?

Answer: First, as Executive Order No. 12291 makes clear, nothing in OMB's regulatory review procedures supplants the ultimate authority of agency heads to issue regulations. Sporadic criticism from agency staff about alleged OMB interference should not be equated with the position of agency heads.

Second, this question assumes there is a need to "control" a "tendency of OIRA" to be involved in the "substance of agency regulatory decision-making." As discussed above, and in Director Darman's and the Department of Justice's February 20 letters, any such "control" is both inappropriate and unnecessary.

To the extent that statutes provide the Executive branch discretion to implement individual regulatory requirements, the President and his Administration are obligated to ensure that agency implementation of that statutory discretion reflects the policies and priorities which the public elected the President to carry out. As we wrote in Part I of the 1988 Regulatory Program,

> "As Chief Executive, the President is constitutionally responsible for the day-to-day implementation of all Federal laws by Federal agencies. This gives the President the responsibility and with it the commensurate authority to oversee the development of regulations by Presidential appointees. (p. 11) * * *
>
> "In addition the obligation to resolve conflicts and set priorities among statutes, the President also needs to coordinate the implementation of all Federal law with the President's political program that the voters elected him or her to carry out, and to mold both to changing circumstances. The day-to-day course of national affairs generates new issues to which the President must make a coherent response and for the resolution of which the public will hold the President politically accountable." (p. 12.)

It is a basic function of the Office of Management and Budget--in carrying out its budgetary, legislative, regulatory, and other forms of program oversight--to assure, within the discretion allowed by law, that agency activities are consistent with the policies of the President and his Administration. To the extent these Presidential priorities reflect a particular "substantive" view of the role and functions of the Federal government, it is the function of OMB to assure that agencies behave in ways consistent with that "substantive" view or set of priorities.

In other words, oversight by OMB all involves the review of "substance." If OMB were not involved with "substance," OMB would not be doing its job.

c. How would you characterize OIRA's obedience to the congressional mandate for a distinction between information management and regulatory review?

Answer: The Congressional mandate in the Paperwork Reduction Act is for the agencies to apply, and for OMB to oversee the agency application of, a set of principles and policies applicable to both information collections contained in rules, and also to those not contained in rules. The substantive standards in the PRA are the same.

In addition, OMB's responsibilities for information management under the Paperwork Reduction Act and its responsibilities for regulatory review under Executive Order Nos. 12291 and 12498 are complementary and mutually supportive.

Under the Paperwork Reduction Act, Congress directed the agencies to accomplish various goals, and provided oversight authority for OMB to work with agencies to assure that they do so. For example, agencies and OMB are to review and reduce the burden of unnecessary Federally-imposed reporting and recordkeeping. In carrying this out, OMB does not separate its review of paperwork activities from its reviews of agency regulations. At least 90 percent of the total Federal paperwork burden is imposed for regulatory or compliance purposes. OMB cannot review Federal paperwork without reviewing agency regulations.

Moreover, OMB examines more than the underlying regulation in which the paperwork requirement may be imbedded. OMB also examines the extent to which related statutory, budgetary, program needs, and broad policy mandates may be driving such paperwork requirements. In short, proper review of paperwork burdens, as required by the Paperwork Reduction Act, must of necessity include a careful understanding of the underlying source of the paperwork requirement.

Similarly, the requirements for Executive oversight of regulatory planning and review set forth in Executive Order Nos. 12291 and 12498 have created a process for OMB to oversee regulations dealing with information resources management. These regulations include GSA's Federal Information Resources Management Regulations (FIRMRs) and the Department of Commerce's Federal Information Processing Standards (FIPS). To the extent that agencies operate major information systems through grants and contracts with States, localities, and other entities, agency program regulations are increasingly an instrument of information policy. Such review of regulations permits OMB to identify and resolve important information policy issues--such as prescribing information technology requirements in program regulations--and assuring compliance with the Computer Security Act of 1987 and the Privacy Act of 1974 especially as amended in 1988 to deal with computer matching.

In summary, the functions of information management and regulatory review overlap and complement each other. The Office of Information and Regulatory Affairs in OMB is responsible for clearance of agency information collection requests, and for implementing Executive Order Nos. 12291 and 12498. Agency requests for OMB review of paperwork as well as regulatory matters are conveyed on the same form, the SF-83. Agencies submit their draft regulatory programs for review and coordination by OIRA. Assigning staff to designated agencies also provides a consistent, clear line of responsibility for oversight and appropriate coordination of agency information management and regulatory activities.

d. Do you think it is possible, as a practical matter, for OIRA, with its paperwork clearance and regulatory review powers, to maintain a distinction between information management and substantive regulatory matters? If not, what should we do? Should we impose further procedural restrictions of the paperwork clearance and regulatory review processes, should we accept the integration of the two processes, should we move one or the other to some other office, or should we prohibit one of them?

Answer: No. As I describe above, the review of agency information management activities and the review of substantive programs, including regulations, are inextricably linked. When we review major systems initiatives, like modernization of the air traffic control system, the advanced weather system, or EPA's toxic release inventory system, the reviewer must first ask questions of substance. The need for information can only be assessed in the context of substantive objectives. In our view, integration of substantive review, whether through the budget or regulatory review process, with information collection reviews is essential to the effectiveness of both. Further procedural restrictions are, in our view, unnecessary and separating the functions would weaken both.

e. How does the record of OIRA desk officers involving themselves in, and often appearing to control, agency information and regulatory decisions comport with the arguments in favor of OMB review, for example, that of the President needing to freely consult with his officers? Where is the dividing line between consultation and outright decision-making? What should we in Congress do to ensure that there is a proper balance between effective executive

management and agency of exercise of congressionally-delegated substantive decision-making authority?

Answer: The nature of OMB's role varies depending on the authority that it is exercising. In reviewing budgets, legislative proposals, regulations, and information resources management, OMB serves as advisor to the President and, while its advice may be important, it is not the ultimate decision-maker.

There is a clear line between consultation and decision-making. Under the Paperwork Reduction Act, OMB **decides** whether or not to approve an information collection and does so based on a written record. Under Executive Order No. 12291, OMB **consults** with the agency responsible, and advises it on issues of consistency with Presidential policies. The agency, in turn, decides how to carry out its legal responsibilities. It is important to point out that "the agency" refers to the agency head responsible for the decision, not agency staff. (See my answer to Question B.2.b.)

The distinction in OMB's role is clearly delineated in the authorities setting up those activities. In our view no further congressional action is needed. In the case of OMB's legislative and budgetary review activities, the Congress ultimately acts (or can choose not to act) on executive proposals; regulations are promulgated by the agencies pursuant to a public process prescribed by the Administrative Procedure Act; and information collection actions are taken based a procedures prescribed in the PRA.

f. Where does the authority and expertise reside for information collection and regulatory decisions? What kind of questions are appropriate for centralized review by OIRA desk officers?

Answer: OMB's authority for review of agency information collections and regulations derives, in part, from the Paperwork Reduction Act and Executive Order Nos. 12291 and 12498. OMB's expertise comes from a diverse, highly trained staff. In a July 1989, report entitled "Regulatory Review: Information on OMB's Review Process" (GAO/GGD-89-101FS), GAO provided background statistics on OIRA employees as of June 1989 (Attachment 6).

The questions that OMB asks are, to a large degree, set forth in the authorities under which we operate and in our implementing regulations. In reviewing information collections under the Paperwork Reduction Act, for example, staff ask: (1) whether the information is required by law or otherwise necessary for the proper performance of the agency's functions; (2) whether the proposal is needlessly duplicative; (3) whether the proposed approach represents the least burdensome approach to meeting the information need; and (4) whether the collection would have "practical utility." The standards for review of regulatory proposals, and thus, the questions that desk officers ask are set forth in Section 2 of Executive Order No. 12291. Two such standards are "(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action; [and] (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."

2. Would you agree that there are major differences between routine application forms and reporting requirements that have gone through APA rulemaking, that a survey is not the same as a regulatory requirement? If so, how do you answer those who challenge the blurring between paperwork clearance and regulatory review, and between nonregulatory and regulatory paperwork clearance? Are any distinctions needed? What are they?

Answer: I will begin with an important and perhaps obvious point. To the person on the street who must fill out government paperwork, it makes no difference whether that paperwork is required by regulation, compliance directive, subpoena threat, or direct statutory authority. I speak from experience when I note that distinctions like these often appear to be mere government semantics to people and businesses faced with a deluge of government paperwork.

Because the burdens of the two kinds of paperwork are indistinguishable to the public, the Paperwork Reduction Act wisely and straightforwardly applies precisely the same substantive standards to regulatory and nonregulatory paperwork. We do not believe that any distinctions in these review criteria are needed or appropriate for different kinds of paperwork. Indeed, applying different review criteria could well be counterproductive by needlessly complicating the Act and inducing agencies to impose paperwork through one administrative route rather than through another depending on the relative stringency of the substantive review standards involved.

As I pointed out in my testimony, S. 1742 would weaken the review standards for regulatory paperwork so much as to render them useless for any serious attempt to reduce paperwork burdens and manage information resources more efficiently. No reason has been advanced for why these different standards are needed. The importance of this issue is underscored by the fact that at least 90 percent of Federal paperwork is imposed for regulatory or compliance purposes.

From a legal standpoint, there are certainly differences between the process by which regulatory and nonregulatory paperwork can be revised. That was why the 1980 Act contained provisions in 44 U.S.C. 3504(h) that were explicitly intended to preserve the opportunity for public comment under the informal rulemaking provisions of the Administrative Procedure Act (APA). Briefly, these provisions require OMB to comment publicly on paperwork requirements in proposed rules, require the agency to respond to the OMB comments in the final rule, and allow OMB to disapprove paperwork in the final rule only if the Director finds that the agency's responses were unreasonable. These procedures were intended to prevent OMB from disapproving paperwork in a final rule if OMB had not objected to that paperwork on the record at the proposed stage. If OMB questions paperwork in an existing rule, it will not disapprove that paperwork until it has given the agency adequate time to initiate notice-and-comment rulemaking under the APA.[5]

Since the inception of the Paperwork Reduction Act, these provisions have, in our experience, been extraordinarily successful in coordinating the public participation rights embodied in both the PRA and the APA. In almost every case, paperwork issues raised by OMB at the proposed stage have been resolved at the final stage, and OMB has approved the final paperwork. Paperwork in existing rules has, without exception, been revised through notice-and-comment procedures under the APA, giving the public full opportunity to express opinion on all sides. To our knowledge, no agency rulemaking has ever been challenged in court because of alleged conflict between APA and Paperwork Reduction Act procedures.

I do not believe that any distinctions in standards of review between regulatory and nonregulatory paperwork are wise. The provisions of the PRA for coordination between the APA and the PRA have worked extremely well, and I support the provisions of S. 1742 that repeat those provisions.

D. PAPERWORK REVIEW

1. How successful is the paperwork review process? Many of the witnesses at the June hearings left me with the impression that much more could be done to reduce the paperwork burden. One witness has said that the cost to American businessmen has increased from $100 billion per year in 1980 to more than $300 billion today.

Answer: I agree that much more can be done to reduce paperwork. We have not been successful in reducing the total paperwork burden in 1990 to below the 1980 level. In fact, paperwork is way up, as I pointed out in my testimony before this Committee. If the standard for success is a reduction below the 1980 level, we have failed. But I would make two further points.

First, without the Paperwork Reduction Act, the paperwork burden would be much larger than it is today. We have eliminated enormous paperwork burdens. Since 1981, implementation of the Paperwork Reduction Act by the agencies and by OMB has reduced the amount of time that Americans would have spent filling out government paperwork by almost 600 million hours each year. This reduction is saving the economy $6 billion annually, assuming conservatively that each hour spent filling out paperwork costs $10. If we are judged by the amount of paperwork we have eliminated, I believe we have been successful.

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[5] See 5 CFR 1320.14.

Second, the Federal government is doing more in 1990 than it was in 1980. Sometimes it seems we are fighting a holding action, pushing back paperwork in one area while it balloons in another. In the past few years, we have seen large new paperwork burdens mandated by statutes, including immigration reform, tax reform, and Superfund amendments. Recent concerns about possible fraud and abuse in Federal grants and contracts will also pressure agencies and the Congress to require more recordkeeping and reporting. Hence, new collections have grown faster than we have eliminated ongoing collections.

a. Can OIRA do a better job of paperwork review than it does now? If so, how?

Answer: The message that we and the Congress have been hearing, loudly and clearly, is that we all need to do more. I think OIRA can do a better job, and we are examining ways of improving our effectiveness. I must say, however, that some of the revisions to the Paperwork Reduction Act proposed in S. 1742 would dramatically impair our ability to reduce paperwork. Any revision to the Act should be examined carefully in light of the need to do more, not less. Let me list some of the ways in which we are attempting to be more effective:

o We have taken steps to improve public participation into paperwork review. In 1988, we revised the regulations implementing the Act to require agencies to disclose on the forms themselves the burden of responding. The agencies must also put on the form OMB's address and advise people that any comments or suggestions for reducing the burden should be mailed to us. This was intended to reach out to those people and businesses on Main Street, America, who do not usually participate in the public comment processes in Washington. We have received almost 1,500 comments to date, and these comments have resulted in revisions to simplify and reduce paperwork.

o We have revised the annual Information Collection Budget for 1990 to encourage agencies to take a broader view of their information needs for programs as whole, rather than concentrating only on individual collections. We believe that this top-to-bottom programmatic approach will result in more efficient information management, and allow agencies to assess more clearly the contribution of any particular information collection to the overall program objectives.

- We are also pushing agencies through the Information Collection Budget to more aggressively implement the Paperwork Reduction Act as they develop and review proposed legislation. We hope to develop legislative proposals to reduce paperwork mandated by statutes. In this regard, closer attention by the Congress to the paperwork requirements in new statutes would be of enormous assistance in reducing overall paperwork burdens.

- We are looking into ways in which State and Federal paperwork requirements can be better coordinated. Presently, there is substantial duplication of paperwork, particularly in the environmental and labor areas. While the Paperwork Reduction Act does not apply to paperwork required by States, I believe there is some opportunity for voluntary coordination.

b. Is the paperwork burden greater and has it increased in recent years in certain sectors of the economy such as taxes and procurement?

Answer: In 1990, the American public will spend over 470 million hours more filling out government paperwork than it did in 1980 (see the answer to Question D.1. above).

With regard to taxes, transition to the changes required by the Tax Simplification Act required a number of one-time filings in 1987 and 1988. All filers of individual tax returns were required to file a revised W-4, many homeowners were required to report in detail on their mortgage loans, investors were required to master the details of identifying and reporting passive activities, and all taxpayers were thrown onto the high end of a learning curve. The burden now is measurably less than it was during the first transition year. Several million persons who were taxpayers before the 1986 Act now file no returns, and that is a clear gain. The home mortgage interest provisions also require virtually no reporting now that the tax code has been further modified. However, some areas remain particularly burdensome, such as the calculation of the passive activity loss, nondiscrimination in employee benefits, calculation of income from tips, and calculation of taxes on lump-sum withdrawals of retiree benefits.

I should also note that in 1988 the IRS re-estimated the tax-related paperwork burden based on a study by Arthur Young, Inc., and adjusted its estimates upward by seven-fold. Currently, tax-related paperwork (imposed by IRS and SSA) is estimated to impose an annual burden of 5.3 billion hours on American people and businesses (at $10 an hour, roughly $50 billion in private effort and expenditures to collect $1,000 billion in funds).

With regard to procurement, over 289 million hours are spent meeting various procurement related information requirements. As the largest buying agency, the Department of Defense imposes over 90 percent of that burden. Recent efforts to reduce this burden have been successful, with 500 discrete requests for information having been deleted or standardized. The net result of these changes was a reduction of more than 36 million hours. Similarly, total government-imposed burden was reduced through standardization of Federal procurement regulations in the Federal Acquisition Regulation. At the same time, however, new requirements for contractor accountability, such as the "Byrd Amendment" anti-lobbying provisions, procurement integrity and drug-free workplace efforts add new procurement related paperwork burdens. Furthermore, the growth in the number of contractual actions more than offsets reductions in the paperwork per action. The net result is a continued growth in the paperwork burdens associated with the procurement process.

c. How closely are the paperwork submissions in these areas reviewed? Can more be done to reduce burdens in these areas, particularly taxes and procurement?

Answer: Paperwork submissions in these areas are reviewed in precisely the same way that paperwork submissions in other areas are reviewed, and we have made significant reductions. I should note that tax-related paperwork is, more often than is the case for other kinds of paperwork, closely tied to statutory language, and hence difficult for the Executive Branch to reduce administratively. For that reason, the IRS has agreed to develop revenue-neutral legislative proposals in 1990 that will attempt to simplify certain burdensome requirements in the tax code. I would like to commend the IRS for its good-faith efforts to reduce and simplify tax-related paperwork. For example, the IRS has developed an extensive program to its tax forms reviewed by selected taxpayers before issuing them for general use.

I will mention a few specific reductions in IRS paperwork that arose from OMB review. Pension reporting is a complex and onerous task for many small businesses. In 1988, the IRS agreed, following a discussion with OIRA, to eliminate for single-person employers the filing requirement to prove tax-exempt status. This action freed 300,000 small employers from this requirement and reduced their annual paperwork burden by over 200,000 hours.

We have worked with the IRS to ensure that taxpayers are not required to read any more instructions or complete any more items than is absolutely necessary. For example, the first version of the form for calculation of the interest on home mortgages qualifying for tax deduction required an unnecessarily large number of homeowners to go through a detailed listing of the loans on their property. We worked with the IRS to eliminate the listing for a large proportion of homeowners, thus reducing the aggregate burden on homeowners by 80 percent, or 13 million burden hours.

We have also discussed with IRS ways to reduce the reporting burden on small business by creating simplified forms for them. Recently, IRS developed an EX form for the employers annual federal unemployment tax return which will result in a net savings of 33 million hours for small businesses. Last year we disapproved a tax return proposed by the IRS for use in 1990 by loggers. The problem was that the form -- whose five pages and eight schedules took 40 hours to complete -- was designed for large logging companies. Most of the detail was unnecessary for the many small loggers and people who sell trees off a few acres. IRS simplified the form for small loggers and owners of small woodlots.

In looking at procurement information collections, OIRA works closely with the Office of Federal Procurement Policy (OFPP) here in OMB to review all requirements imposed by the Federal Acquisition Regulation, individual agency supplements to the FAR as well as other information requirements imposed by specific contracts or procurement policies. Much of our reductions of procurement paperwork is the result of public comment, advising us of a particularly burdensome collection. Indeed, because of the large volume of procurement collections stemming from the Federal Acquisition Regulation and agency supplements to the FAR, we rely heavily on public comment to help us identify those areas that impose the most burdensome procurement information requirements.

The majority of the Department of Defense's (DOD) procurement paperwork is imposed through the specification of data items for deliverable products under DOD contracts. There are more than 2,018 standardized individual information collection requirements, which require 1.2 million contractor responses resulting in a total burden of 170 million hours. In 1986 we directed DOD to review this collection for areas of reduction. After a series of Federal Register notices soliciting public comment and internal analysis, DOD was able to reduce the burden of this collection by over 20 percent (36 million hours) through consolidating and eliminating data items. This is an on-going effort. DOD is expected to further consolidate many of these requirements. At the same time, the Department of Defense, as part of the Defense Management Initiative, is reviewing its acquisition policies for ways to streamline the procurement process and reduce DOD procurement regulations and related paperwork requirements.

OMB is actively pursuing other efforts to reduce the burden of the Federal acquisition process. A recently released OFPP report to Congress, "Federal Procurement Paperwork Burden" identifies areas of particular concern for further review and possible burden reduction. This report was mandated in the OFPP Act Amendments of 1988, and was done in consultation with OIRA. One area that adds great promise for reducing procurement paperwork is through the Government's increased acquisition of commercial products that require much less contractor paperwork.

2. Can agencies do more to help reduce the paperwork burden?

Answer: The Paperwork Reduction Act rightly places the primary responsibility for reducing paperwork on the agencies, who are in the best position to understand program data needs and to develop less burdensome alternatives for satisfying data needs. Although many agencies have done good jobs within statutory constraints to reduce paperwork, I believe that, in general, agencies need to pay more attention to paperwork reduction. For example, regulatory agencies could do a much better job in looking for ways to reduce paperwork for small businesses. Agencies could be more vigorous in identifying and pursuing changes in statutes to reduce paperwork. Agencies could also do more to evaluate the effectiveness of paperwork in achieving program objectives, in order to eliminate ineffective and unnecessary paperwork. The 1990 Information Collection Budget that we will publish shortly attempts to implement several of these efforts.

a. OIRA already has authority to delegate paperwork reviews to agencies, but I believe this authority has not been used with much frequency. Why not?

Answer: We are anxious to delegate primary review to qualified agencies and will take further steps in this direction. The procedures for requesting approval authority and the criteria that OMB uses to determine if delegation would be consistent with the Act are prescribed in the implementing regulations at 5 CFR 1320.9. In the past, we have delegated paperwork reviews to the Board of Governors of the Federal Reserve System.[6] We have also received requests for delegation from the Department of Health and Human Services and Department of Veterans Affairs. We informed both agencies of our interest in delegating, once the agencies modified their procedures to conform to the criteria set forth in the regulation. No further action on delegation to these two agencies has occurred yet. At this time, we are in the process of delegating to the Tennessee Valley Authority the authority to review certain collections of information.

b. Is the self-certification proposed in S. 1742 a workable way to involve agencies in the review process?

Answer: Yes. Agency review and self-certification explicitly place responsibility and accountability for periodic reassessment upon the agency, and thereby should improve the evaluation of previously-approved information collections. Yet, as Director Darman pointed out in his February 20, 1990, letter, we should not forget why the Paperwork Reduction Act gave authority to a central review outside of the agency; agencies have strong incentives to leave in place existing information collection requirements, and for a variety of reasons are often reluctant to initiate needed improvements. The Congress believed in 1942, and affirmed in 1980 and 1986 that Federal paperwork would be reduced only if a central reviewer, outside the institutional interests of the agency collecting the information, were empowered to reach an informed, independent judgment, and to enforce that judgment.

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[6] See 5 CFR 1320.9(d)(1), and Appendix A to 5 CFR 1320.

Specifically, S. 1742 would change 44 U.S.C. 3507 by adopting new and burdensome review procedures and by requiring OIRA to approve existing collections of information contained in a rule unless OIRA finds the collection activity "arbitrary and capricious." This new standard would make it essentially impossible for OIRA to review substantively existing collections, and eliminate the independent, outside reviewer. Director Darman also described a number of other concerns with this provision in his February 20 letter.

c. Would our provisions for an independent IRM effort at the agency level help the review process?

Answer:Yes Any provision that would increase the agencies' own independent efforts at reviewing paperwork at the agency level would be an asset. OMB continues to believe that agencies have primary responsibility for managing their information resources.

3. Why doesn't the Federal Information Locator System work? What do we need to do to make it work? Are there any examples of where the Federal Information Locator system has been used by OMB to identify and stop overlapping or duplicative information collection?

Answer: The Federal Information Locator System (FILS) does work within the parameters set for it by Congress, namely, to provide a central directory of information about government forms, the input to government. One problem for FILS is that the public seeks government information outputs--publications, databases--not government information inputs. As to examples of where FILS has identified and stopped duplicative information collections, these identifications and stoppages take place at the agency level, so they never come to OMB.

4. During the hearings, you stated that OMB does not and has not interpreted the 5% paperwork burden reduction goals as applying agency by agency. OMB Bulletin 89-18...states that "each agency is expected to make appropriate plans to meet this goal by the end of FY 1990." This has been taken by many to mean each agency must reduce its paperwork burden by 5%. Is this correct? If not, does OMB plan to issue a clarification stating that the 5% goal is applied government-wide and not agency by agency?

Answer: No, we do not plan to issue a clarification. Although we do not interpret the statute as requiring that each agency reduce the paperwork burden by 5 percent, we fully intend that every agency do whatever it can to reach the government-wide goal. Clearly, reducing total Federal paperwork by 5 percent means that each individual agency must do its share. Our presumption is that every agency will attempt to reach the goal. When we review the paperwork reduction plans for individual agencies, we discuss with them the reasons why they may have failed to reach the goal. In some cases, we agree with them that it is not appropriate, in light of their responsibilities and needs, to reach the goal. That decision, however, is made on a case-by-case basis, and only after agencies have made every effort to reduce paperwork.

5. The letter from the Department of Justice...states that the 5% goals for FY 1990 through FY 1992 "are arbitrary numbers which do not take into consideration the past reductions made by an agency." Does OMB agree and what changes does OMB believe should be made in the burden reduction goals?

Answer: As I described in the answer above, we discuss with agencies the reasons why they may have failed to reach their burden reduction goals. Past efforts by an agency to reduce its reporting burdens, in the context of its existing base of information collections, are pertinent to any such discussion.

6. The detailed comments on S. 1742 state that OMB has "the ability to withdraw an existing approval -- to disapprove in part or in whole an already approved information collection."

a. This is a matter of some disagreement. Please indicate the statutory language which gives OMB the authority to withdraw approval once a control number has been issued?

Answer: The Paperwork Reduction Act provides ample authority for OMB's review of previously-approved paperwork, both regulatory and nonregulatory, and to approve or disapprove the paperwork under the standards in the Act. A full discussion of this issue is provided in the preamble to the implementing regulations published on March 31, 1983 (48 F.R. 13666) (Attachment 7). In the 1986 amendments to the Act, the Congress reaffirmed OMB's authority to review existing paperwork specifically in regulations.

As a general matter, one of the key concepts embodied in the Act is the sunset clause, which requires agencies and OMB to determine at least every three years that information is still needed. Another key concept was that the public should have an opportunity to comment periodically, and that OMB and the agency should consider those comments in reviewing information collections. Clearly, these two concepts have no meaning if OMB is not able to change an earlier decision to approve.

The specific statutory language which you seek is found in the last sentence of 44 U.S.C. 3508, which states:

> "To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information."

On the basis of this authority, OMB has withdrawn approvals already granted, and instructed agencies not to engage in the collection of information involved.

b. How does OMB reconcile this interpretation with the clear statutory language limiting the time for review and providing for automatic issuance of a control number should OMB exceed those time limits?

Answer: The two issues are related only peripherally. The statutory time limit simply requires OMB to make a decision to approve or disapprove an information collection no later than 60 days (or 90 days if OMB extends its review) after the agency submits an information collection for review. If OMB exceeds the limit in reaching its decision, "the agency may collect the information for not more than one year" (44 U.S.C. 3507(b)).

The time limit does not affect any approval or disapproval decision that OMB makes within the time limit, OMB's authority to have an agency submit an information collection for review, or OMB's authority to withdraw an approval once granted (except as provided by the provision quoted above).

c. The detailed comments state that OMB has withdrawn its approval "rarely." Please provide a description of all the times OMB has done so since the enactment of the Paperwork Reduction Act.

Answer: Unfortunately, our computer system will not separately identify those cases where OMB disapproved in whole an information collection that was previously approved and that the agency did not revise prior to submission to OMB. We have, however, conducted a manual search for 1988 and 1989. Out of almost 7,000 reviews of ongoing information collections, we disapproved nine (0.13 percent) that we had previously approved; that is, we withdrew OMB approval from nine collections. Attached are OMB computer printouts that describe those nine collections and the OMB comments explaining our disapproval (Attachment 8).

We more frequently disapprove portions of ongoing collections that had been previously approved, as a result of public comment or additional information from the agency. These cases do not constitute a withdrawal of OMB approval, but, rather, a modification of an existing collection.

E. QUALITY OF INFORMATION

1. How concerned is OMB with the benefits and the quality of federal data? What can be done to encourage improved quality? Whose responsibility is it to get federal data that looks at future trends and projections for strategic planning?

Answer: In Building a Better America President Bush described the commitment of the Administration to improved statistics. Among the principles mentioned by the President were:

> Strengthen social, economic, and trade statistics and analyses to improve the competitiveness of American businesses.
>
> Improve the quality and reliability of socio-economic data to improve the effectiveness of Federal programs and meet the information needs of users.

It is important to point out that while improvements can always be made, the quality of Federal government statistics is among the highest in the world. One important area where the Administration is making improvements is in economic statistics. The Economic Policy Council has appointed a working group to address these problems and the FY 1991 budget reflects their work. The budget contains increased funds, for example, for improvements to GNP estimates, trade statistics, foreign investment data and service sector productivity data.

OMB has been concerned for many years with the quality of statistical data. One of the results of that concern has been the Federal Committee on Statistical Methodology which is chaired by OMB. The work of this committee has produced 15 monographs and several seminars on the work of the committee have been held.

The acquisition of data and management of statistical programs is the responsibility of the individual statistical agencies. However, because the United States has a decentralized statistical system, leadership and coordination of statistical programs is provided by OMB.

2. Title II of S. 1742 would establish a sixteen-member Commission on Federal Information to study and make recommendations pertaining to the Federal Government's information statistical policies. OMB would be required to implement, where feasible, the Commission's final recommendations and to make interim reports to Congress on the status of actions taken. What are your thoughts concerning the creation of this proposed commission, and do you anticipate that your current staff would be able to oversee agency-wide implementation of the

commission's final recommendations?

Answer: As I testified, we support creation of this Commission. My testimony and Director Darman's February 20, 1990, letter point out certain reservations we have with the statutory language.

Our experience with the 1974 Commission on Federal Paperwork, on which this Commission is modelled, suggests that many of its recommendations will involve agency activities, rather than those of OMB. OMB's role will be to coordinate agency and OMB implementation of agreed-upon recommendations and report agency and OMB views concerning the recommendations.

The Commission's recommendations may have budgetary, personnel, managerial, regulatory, and information resource implications, as well as implications related to statistical policy. At this point it is speculative to identify which OMB staff would be most suitable to carry out this oversight, or how OMB would coordinate this oversight among the various components in OMB, until after the Commission makes its recommendations. It would thus be premature at this time to speculate on the number of OMB staff needed to oversee agency implementation of the Commission's final recommendations.

3. The Paperwork Reduction Act of 1980 mandated the establishment of the Federal Information Locator System (FILS). In your December 1988 report entitled Managing Federal Information Resources, you state that OIRA began plans in 1988 to make the FILS database accessible to the general public. What is the status of this project, and could you share with us any feedback you may have had from the public or depository libraries? Why doesn't this system work?

Answer: On October 11, 1989, OMB published in the Federal Register a notice entitled "Public Access to the Federal Information Locator System" (Attachment 9). The notice explained that OMB has now made the FILS database available to the public in three ways: (1) in microfiche form at 525 Federal Depository Libraries throughout the country; (2) in paper, microfiche, or diskette form purchasable from the National Technical Information Service, Department of Commerce; and in paper form for public inspection without charge at OMB. Feedback from the public and depository libraries, while only anecdotal via telephone inquiries, indicates initially high interest in FILS based upon its title. Once potential users understand that FILS contains only information about government forms, interest slumps sharply. A basic problem for FILS, as noted earlier, is that the public seeks information about government information outputs--publications, databases--not information about government information inputs.

4. A June 1989 GAO report entitled Little Real Paperwork Burden Change in Recent Years found that there was a "very small net increase" in the reporting burden on businesses and a "more substantial increase" on individuals and other groups due to information needs required by tax and immigration reform legislation. Would you care to comment on these findings? What could be done to decrease these reporting burdens?

Answer: I believe GAO's findings are generally accurate. As I noted above in my answer to Question D.b, although much paperwork reduction has been accomplished, there has been a net increase due to information requirements that result from legislation such as immigration reform, Superfund, the tax laws, and procurement practices. Decreasing reporting burdens thus requires that greater concern be given to the principles of the Paperwork Reduction Act when Congress is drafting legislation and when agencies are developing or reviewing legislative proposals.

5. One of OMB's responsibilities under the Paperwork Reduction Act is to ensure interagency coordination in the collection of information for the public. What progress has been made in this area?

Answer: To ensure interagency coordination for all statistical activities, including the collection of information, OMB organized in 1988 and chairs a committee of heads of statistical agencies. This committee, chaired by OMB, meets about every five weeks to discuss mutual projects and problems and to coordinate agency initiatives. Two specific examples of improved coordination follow.

OMB has worked with the Customs Service to apply computer technology to reduce the paperwork associated with the importation of foreign goods. Pilot projects are underway with several agencies which use information about imports, and as many as nine Departments and independent agencies are expected to eventually use the Customs system to replace all or part of existing reporting requirements.

As another example, OMB organized an interagency Task Force on Household Survey Redesign to coordinate the redesign of the seven major continuous household surveys sponsored by Federal agencies. The purpose of the Task Force is to satisfy the needs of sponsoring agencies, fulfill the needs of data users, and accomplish the data collection in a timely and cost-effective manner, with a minimum burden on the public. Memorandums of Understanding have been developed between the sponsor agency, the data collection agency (Bureau of the Census), and OMB to achieve these goals.

F. INFORMATION DISSEMINATION

1. Does the electronic information age place a greater demand on the government for a new information dissemination policy? If so, to what extent should that depend on a centralized policy office? How much flexibility should be given to each agency, and what are the best ways of ensuring guidance and flexibility? Is there a danger in giving utter authority to agencies to set their own individual policies?

Answer: The electronic information age does indeed place a greater demand on the government for a new information dissemination policy. Some statutes were conceived with paper records as the model, and these laws may no longer be adequate for the electronic age. New technologies are changing the way the government does business. Internal agency automation of information holdings has made it vastly cheaper for agencies to consider electronically disseminating large information holdings to the public.

OMB has consistently maintained that the focus of responsibility for management of Federal information resources is the head of each agency. That person is best qualified, both in terms of Executive authority and practical reality, to interpret the agency's mission and decide the shape of the agency's information dissemination program. OMB sets forth a general policy framework within which agency determinations are to be made and the standards and provisions for reviewing the determinations, but the management decisions and their ~~implement~~ation belong properly with the agency holding the information resources.

OMB believes some centralized policy authority is essential in order that agencies adher~~e to~~ reasonably uniform principles and standards. As only one example, government-wide standards such as the Federal Information Processing Standards ensure that government computers are interoperable with one another, with accompanying benefits for integrated Federal financial management and coordinated law enforcement.

2. Given the role OMB is already playing pursuant to the Paperwork Reduction Act, how can OMB's policy-making role be improved? What is the most constructive approach which Congress could take?

Answer: OMB believes that some of the legislative proposals now before the Congress would be constructive improvements to OMB's policy-making role. S. 1742 appropriately recognizes the increasing importance of information as a valuable resource and the need for the Federal Government to give increased attention to its management. In particular, its provisions related to information dissemination, sharing, privacy, security, and records management highlight areas where a special focus is required. In this bill, for the first time Congress proposes to set forth a policy framework stipulating how all Federal agencies should behave with respect to information dissemination. In the

Freedom of Information Act and other legislation, Congress has addressed access to information, how agencies should act when the public requests information. S. 1742 proposes to instruct agencies concerning their responsibilities for actively sharing information, over and above requests from the public. This is a major step forward and will greatly assist OMB in discharging its general information policy functions under the Act.

3. Is S. 1742 an improvement on the current OMB Circular A-130? What is the status of A-130? When will OMB reissue it?

Answer: Provisions such as those cited above in question F.3. can improve OMB Circular No. A-130 by affording a specific statutory basis to policies elaborated in the Circular. The information disseminations provisions in S. 1742 are, as we read them, generally consistent with the principles set forth in OMB's policy notice published in the Federal Register on June 15, 1989.

While staff are engaged in drafting possible revisions to the Circular, OMB plans no issuance pending anticipated congressional action to amend the Paperwork Reduction Act. Staff work is concentrating on topics that have been given insufficient attention in the past, such as planning for information technology acquisitions, the partnership role of State and local governments in information collection and dissemination, and the place of records management in Federal information resources management. When OMB does issue proposed revisions to the Circular, OMB will follow informal notice and comment procedures, as it has in the past, before issuing final policy.

4. How do we balance the performance of government's information dissemination functions with the need to do so in a manner which is cost-effective and efficient?

Answer: While enunciating agencies' positive responsibilities to disseminate information to the public, we must stress the importance of sound management practices. Efficient, effective, and economical dissemination does not translate into diminishing or limiting the flow of information to the public. To the contrary, good management of information resources should result in more useful information flowing with greater facility to the public, at less cost to the taxpayer.

Part of cost-effective and efficient dissemination is active knowledge of the public that is using government information so that government information products better fit the public's needs. This may require agencies to pay more attention to user surveys as a means to increasing the productivity of information dissemination programs.

5. How does the Federal Depository Library program change

in the era of electronic access to on-line government information?

Answer: The Federal Depository Library program is part of the Government Printing Office, and hence a program under the policy control of GPO. Clearly the advent of electronic media for disseminating government information products will have far reaching effects for the distribution system GPO employs for depository libraries. GPO will have the difficult task of determining whether on-line access to government information is a necessity for the depository libraries. This will entail, at a minimum, a series of explorations and decisions concerning the costs of on-line access and the library public's profile of information usage.

G. STATISTICAL POLICY

1. It seems to me that it would reap large benefits in the future, in terms of both reduction of paperwork and improved information quality if we improved the statistical operations of the Federal Government. Just in terms of policy making, Dr. Michael Boskin, Chairman of the Council of Economic Advisors, recently pointed out the vital importance of the quality of data.

a. Should we devote more resources to this area?

Answer: For fiscal years 1990 and 1991 the Administration has attempted to increase funding for this area. In the fiscal year 1990 budget the Administration put forward initiatives of $16.5 million to improve corporate financial information, domestic investment estimates, foreign trade statistics, service sector data, restoration of the sample size to the Survey of Income and Program Participation and the scope of the Current Population Survey. Unfortunately, the Congress denied the funding for these initiatives.

For fiscal year 1991 we have again asked for funding for these programs and in addition we have asked for $9 million to begin the process of moving the United States to the international System of National Accounts, for improved foreign investment data, and for work on estimating productivity in the service sector. Consistent with the President's emphasis on the importance of education, we have proposed a $20.7 million increase for the National Center for Education Statistics. In fact, the President's budget for the major statistical agencies contains proposed increases of $82.6 million or 13.2 percent.

b. As I understand it, statistical policy has a total of 5 professionals, including the Chief Statistician. Given the level of responsibility, the importance of the issues and the benefits that can be derived, is this sufficient?

Answer: The Paperwork Reduction Act recognizes that a decentralized statistical system such as ours requires an office to set standards and polices and to provide leadership and coordination. We agree that the current staffing level of the office should be enhanced.

2. Currently, under the Paperwork Reduction Act, OIRA has responsibility for statistical policy. It seems to be that you need to take the lead in this area. Yet, in written response to follow-up questions for the Subcommittee's hearings last year, then Director Plager stated in response to OIRA's statistical functions,

> "Given our overall OIRA resource constraints ... we have had to make do with very limited resources here. ... we are trying to augment the resources available for this purpose."

a. What are you currently doing to increase resources in this area?

Answer: We would like to point out that the need for additional statistical resources is faced by every statistical agency as well as the Statistical Policy Office in OIRA. One of the reasons for this difficulty is the inability of the Federal government to compete for statisticians. For example, to compete with universities to hire new Ph.D. graduates with no experience, the government would have to offer entrants a GS-13 instead of the GS-11 now allowed under current personnel rules.

This limitation has effectively precluded our ability to hire new Ph.D trained statisticians at OMB. We are, however, working on some innovative programs that will allow agencies to gain a better insight into the Statistical Policy Office and provide for additional resources for the office. Under this program OMB would provide for long-range training opportunities of up to a year for approximately three or four agency personnel at a time. This program would provide: (1) agencies with an opportunity to learn more about OMB, (2) agency staff with exciting training opportunities, and (3) the Statistical Policy Office with additional skills. While the details have not been worked out, we think this is an exciting prospect.

b. Do I have your commitment to increase these staff resources?

Answer: Consistent with the overall resource limitations that constrain OMB and all agencies and the difficulties in recruitment that we discussed above, we are committed to enhancing the resources of the Statistical Policy Office.

3. In your statement, you suggest that changes to OIRA's IRM and

statistical policy functions contained in S. 1742 be postponed. Yet, Director Darman's letter contains only one minor change to the provisions on the statistical functions and few changes to the IRM functions.

a. Does OMB believe that the changes to OIRA's statistical functions are anything more than minor?

Answer: We support the changes to Section 3504(d) contained in S. 1742. These changes, such as 3504 (d)(1)(C) and (I), serve to clarify the responsibilities of the Statistical Policy Office. We believe that broader questions such as those relating to the basic structure of the Federal statistical system should be left to the Commission.

4. During the hearing, you implied that OIRA was seeking to hire additional personnel in the statistical policy area. Is this correct and what additional resources have been allocated to this area?

Answer: See answers to Questions G.1 and G.2.

H. COMMISSION ON FEDERAL INFORMATION

1. I am puzzled by the OMB's detailed comments on the powers of the Commission. The Commission is structured the same as the former Commission on Federal Paperwork and is given the same powers. I am especially puzzled by the reference to the subpoena power, when the legislation does not grant the Commission power to issue subpoenas, unlike the Paperwork Commission which had extensive subpoena power. Why would OMB object to granting this new Commission the same powers that had been granted to commissions in the past?

Answer: Section 206(a) in S. 1742 states that--

> "The Commission, or at its direction, any subcommittee or member thereof, may ... hold such hearings, ... receive such evidence ... as the Commission or such subcommittee or member may determine advisable. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States."

It was those provisions in S. 1742 which we thought could be read as providing the Commission the equivalent of subpoena power.

As Director Darman wrote in his February 20 letter--

> "As some members of the Commission will be individual Members of Congress, such statutory powers could raise separation of powers issues."

For that reason, we would object to granting this new Commission power to call in Executive branch officials or require the production of information from Executive agencies.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 23 1989

Honorable William K. Reilly
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington D.C. 20460

Dear Mr. Reilly:

On July 20, 1988, we received for review under Executive Order No. 12291 an Environmental Protection Agency (EPA) proposed rule entitled "Proposed Amendment to Hazardous Waste Incinerator Standards." This draft proposal would establish additional limits (beyond those already in place) for emissions of toxic metals, hydrogen chloride (HCl), and total unburned hydrocarbons (THCs)[1] from hazardous waste incinerators. EPA also submitted for review two draft guidance documents implementing the HCl and THC portions of this rule. Based on the information in EPA's Regulatory Impact Analysis (RIA), the incremental benefits of the proposed limits are extremely small and existing standards on incinerators are apparently sufficient to protect human health and the environment. In the absence of more information on the effects of these limits, we must conclude that this rule does not comply with Section 1(b) of Executive Order No. 12291. Therefore, we are returning this draft rule, with the guidance documents, for your consideration.

This draft regulation amends existing hazardous waste incinerator regulations at 40 CFR 264, Subpart O, by adding specific limits on toxic metal, hydrogen chloride, and residual organic emissions. These emissions are already controlled under existing standards: toxic metal emissions are restricted by a limitation on particulate matter; releases of hydrogen chloride are subject to a technology-based standard; and organic emissions are limited by a destruction and removal efficiency (DRE) standard. The draft regulation keeps these requirements in place and adds more stringent limits based on EPA calculated Reference Air Concentrations (see Table 1).

Overall, EPA's primary mission is to reduce the level of risk to the health of the American people and to the quality of our environment. To achieve this goal, the Agency committed to control pollution as efficiently as possible, by focusing the Agency's limited resources on cases of greatest risk.[2]

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[1] The THC limit uses carbon monoxide (CO) as a proxy.

[2] See Regulatory Program of the United States Government, April 1, 1988 - March 31, 1989, page 375.

Table 1

SUMMARY OF INCINERATOR EMISSIONS LIMITS

Pollutant	New Source Performance Standards (40 CFR 60)	Existing Rule for Waste Incinerators (40 CFR 264)	Proposed Requirements
Metals	0.08 grains/dscf	● 0.08 grains/dscf	● 0.08 grains/dscf
			● metal specific Reference Air Concentration (RAC)*
Organics	none	● 99.99% destruction and removal, and;	● 99.99% destruction and removal, and;
		● unit specific CO limit with continuous monitoring	● CO limit of 100 ppm or level associated with lifetime MEI risk of $\leq 10^{-5}$
Hydrogen Chloride	none	● 1.8 kg/hour or;	● 1.8 kg/hour or;
		● 99% destruction and removal, and;	● 99% destruction and removal, and;
			● RAC*

* RAC's correspond to emissions that pose a one in one hundred thousand (10^{-5}) chance that a maximumly exposed individual will suffer an adverse health affects after 70 years of exposure under reasonable worst case assumptions.

This is a complex task requiring the Agency to determine what sources of pollution need to be addressed and how best to control them. Based on the available information, we are concerned that this draft rule may not represent the most efficient use of the nation's pollution control resources.

Of the three proposed incinerator controls, the Agency only estimated benefits for one: toxic metal limits. (EPA estimated cancer-related health benefits; it did not estimate the reduction in non-cancer effects due to the toxic metal standard.) Based on this information, EPA's analysis indicates this rule will not significantly reduce risk. First, EPA estimates that the toxic metal limits will yield a reduction of 0.01 statistical cancer cases each year.[3] Second, EPA's RIA indicates that toxic metal emissions from these devices pose extremely small risks. For instance, EPA's estimates of the upperbound lifetime risks to the most exposed individual are generally lower than the average lifetime risk of being killed by lightning (see Table 2). EPA estimates that upperbound lifetime risks under existing standards range from five in one hundred thousand to one in one billion--risks within or below EPA's acceptable risk range of one in ten thousand to one in one million (see Figure 1).[4]

Table 2

RISK OF DEATH FROM VARIOUS CAUSES IN THE U.S. POPULATION

Cause	Risk (based on 70 year lifetime)
Motor Vehicle	2×10^{-2}
Fire	2×10^{-3}
Choking (food or objects)	1×10^{-3}
4 tablespoons of peanut butter per day (cancer)	6×10^{-4}
Yearly roundtrip flight N.Y. to L.A. (ionizing radiation)	2×10^{-4}
Riskiest hazardous waste incinerator	5×10^{-5}
Lightning	4×10^{-5}
Riding Mowers	3×10^{-5}
Toothpick ingestion	3×10^{-6}

Source: *Statistical Abstract of the United States*/EPA documents.

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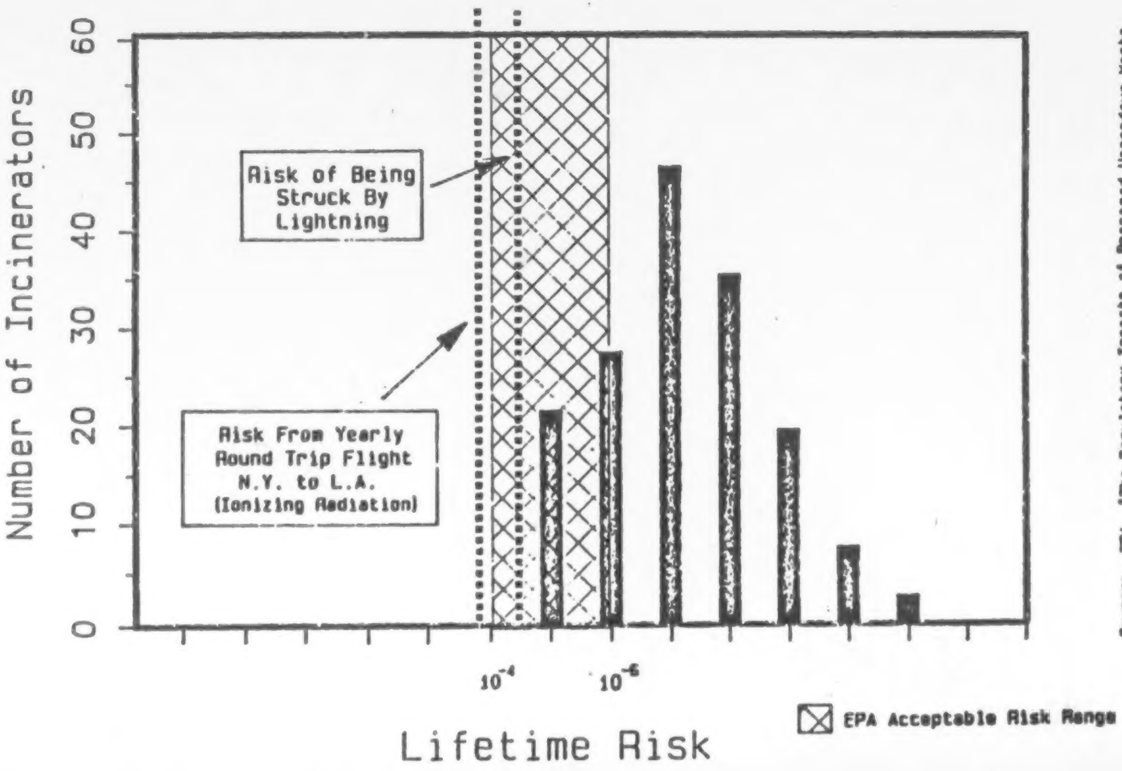
[3] There are over 420,000 cancer mortalities in the U.S. each year.

[4] See letter from EPA Administrator Lee Thomas to Senator George Mitchell dated June 24, 1988.

Figure 1.

Risks Posed By Toxic Metal Emissions From Incinerators



Source: EPA, "The Regulatory Impacts of Proposed Hazardous Waste Incineration Regulations" (Draft), April 1988.

EPA estimates that this draft proposed rule will cost consumers and industry $6.4 million annually; the toxic metal standard will impose costs of $2.9 million per year. As a result, the risk-cost tradeoff for the toxic metal portion of this rule yields a cost of $288 million per statistical cancer case avoided. This compares unfavorably with other Federal regulatory actions, falling far out of the range of resources normally expended to reduce health risks[5] (see Table 3). This rule exceeds the range of costs generally accepted for risk reduction regulations by such a great margin that we believe you should examine further the likely benefits of the draft proposal.

Table 3

RISK-COST TRADEOFFS FOR SELECTED REGULATIONS

Regulation	Agency	Year issued	Cost per statistical life saved ($ millions)
Unvented space heaters	CPSC	1980	$ 0.07
Servicing wheel rims	OSHA	1984	0.25
Fuel system integrity	NHTSA	1975	0.29
Fall protection	OSHA	1985	1.40
Ethylene Oxide	OSHA	1984	60.00
Asbestos	OSHA	1986	89.00
DES ban in cattlefeed	FDA	1979	132.00

Source: *Regulatory Program of the United States Government, April 1, 1988--March 31, 1989*, page 36.

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[5] In addition, it falls well outside of the range of $300,000 to $700,000 per statistical cancer case avoided that EPA has generally used as a measure of the willingness-to-pay for a reduction in health risks. See EPA, "Regulatory Impact Analysis of Proposed National Primary Drinking Water Regulations for Synthetic Organic Chemicals," September 1, 1988, page 5-9. Also, see EPA, Guidelines for Performing Impact Analysis, December 1983, page 11.

At this point, our review is constrained to examining the costs and cancer related benefits of the proposed additional controls on toxic metals. We encourage EPA to specify other benefits that may result from the proposed additional controls on HCl and THCs. These estimates need not be precise, they could, for instance, be presented as ranges.

I also encourage you to consider regulatory alternatives that may result in greater reduction in risk. Such alternatives might help meet our mutual commitment to focus scarce resources where significant risk reduction is obtainable.

If you have any questions, please contact me.

Sincerely,

Jay Plager
Administrator
Office of Information and
Regulatory Affairs

OCT 18 1988

Honorable Richard E. Lyng
Secretary of Agriculture
Washington, D.C. 20250

Dear Dick:

Your letter dated October 3, 1988 requests that I approve the animal welfare regulations submitted by the Animal and Plant Health Inspection Service (APHIS) that are currently being reviewed by the OMB's Office of Information and Regulatory Affairs (OIRA). You state that our consultation with the Interagency Research Animal Committee (IRAC), which represents all Federal agencies that carry-out research using laboratory animals, is ill-advised. In addition, you state that our request for additional analysis is unnecessary and would unduly prolong the regulatory process.

The President's Executive Order No. 12291, under which these regulations are being reviewed, was designed to:

> "reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversite of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations,...."

In promulgating new regulations, agencies are required to adhere to certain requirements:

> Sec. 2(a). Administrative decisions shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.
>
> Sec. 2(d). Among alternative approaches to any regulatory objective, the alternative involving the least net cost to society shall be chosen.

Regarding the role of OMB, Sec. 6 of the Executive order states that the OMB Director shall have the authority to:

> Sec. 6(a)(3). Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source.
>
> Sec. 6(a)(5). Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and in such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict.

In the course of OIRA's review of these draft regulations, OIRA has sought assistance and advice from a number of agencies. First, on May 18, 1988, OIRA sent the enclosed letter to IRAC to seek agency estimates on their cost of complying with these regulations. Thereafter, IRAC and representatives of APHIS met, and APHIS suggested that the affected agencies send certain data to APHIS to permit APHIS to run the data through a similar computer model which produced the APHIS Regulatory Impact Analysis. IRAC member agencies did so, but only in the past few days did APHIS tell the IRAC members that APHIS would not cooperate and determine the cost impact of the data that IRAC provided APHIS.

Second, on August 12, 1988, in the enclosed letter, OIRA asked the IRAC members to review the substance of the draft proposed and final rules submitted by APHIS. A number of Federal agencies evaluate environmental hazards, and the safety of drugs, cosmetics, and pesticides, through the use of animals in laboratory experiments. We have begun to receive some responses discussing the effects of these draft regulations on agency research and regulatory compliance monitoring, but many more responses are still due to come in.

Third, on September 6, 1988, OIRA sent the enclosed letter to APHIS asking that agency to expand its Regulatory Impact Analysis (RIA) in certain ways. For example, the draft RIA did not attempt to quantify the indirect opportunity costs of the draft regulations on biomedical research. As OIRA stated in its letter:

> For instance, the RIA could list the contributions of biomedical research of human health-safety that have resulted from animal research and describe the potential losses to society when research costs are increased by the regulations.

In these days of tight budget constraints, it would appear that any increased costs to Federal laboratories utilizing animals might come at the expense of the research or compliance monitoring itself. Both you and the head of APHIS have refused to comply with this request, suggesting that it is "unnecessary" to consider the impact of the increased costs of your draft regulations on the nation's biomedical research and regulatory compliance monitoring.

The draft APHIS animal welfare regulations are far-reaching, complex, and will affect both private and government institutions. According to the preliminary Regulatory Impact Analysis (RIA) prepared by APHIS, the first-year cost to the private sector of complying with these draft regulations will be about $1.07 billion. Since the Animal Welfare Act requires Federal agencies carrying out medical and other research that utilizes animals to comply with the same standards as private laboratories (7 U.S.C. 2143(c)), the impact of the rules in Federal agencies is also significant. We estimate that the annual Federal compliance costs could be at least $100 million. The Animal Welfare Act requires the Secretary of Agriculture to "consult and cooperate with other Federal departments" concerning the issuance of these regulations (7 U.S.C. 2145(a)) -- coordination that did not take place prior to the publication of APHIS' proposed Parts I and II.

The questions asked by my staff are entirely appropriate. In fact, this part of their review is required under the Executive order. Given that USDA regulations have been reviewed under Executive Order No. 12291 for almost eight years, these requirements should come as no surprise. Your current resistance to fulfilling your agency's obligations presents the most serious delay in the promulgation of these rules.

I would suggest that you instruct your staff to cooperate fully with mine, so that we might resolve any differences within the Executive Branch. Only then can OMB clear these regulations for publication in the Federal Register.

Sincerely yours,

JAMES C. MILLER III

James C. Miller III
Director

Enclosures

c: Dr. James Glosser
Administrator, APHIS

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

June 8, 1983

Mr. Robert Bartley
Editor
The Wall Street Journal
22 Cortlandt Street
New York, New York 10007

To the Editor:

The Wall Street Journal's recent report that a career official in the Office of Management and Budget blocked a proposed regulation to require Reye's syndrome warning labels on aspirin (Reaganites Find Plans for Deregulation Stall After EPA Revelations," June 6, 1983) is false. The decision not to issue the proposed warning label regulation was made by Richard Schweiker, then Secretary of Health and Human Services, based in large part on the recommendation of the American Academy of Pediatrics that such a labeling requirement would not be in the best interest of children, and that further investigation was necessary regarding the association of aspirin use and Reye's syndrome.

We write as a group because the three of us, who were the senior Administration officials involved in the decision, discussed the issue at length both before and after the Academy of Pediatrics issued its recommendation. Our discussions were concerned exclusively with the scientific evidence about aspirin use and Reye's syndrome, and about the possible adverse health consequences of discouraging use of aspirin in medically appropriate circumstances. These public health issues were much in the press at the time, including an editorial page article in the Journal on October 15, 1982 highly critical of the warning label proposal. The financial interests of aspirin manufacturers (and the contrary financial interests of acetaminophen manufacturers) were never mentioned and had nothing to do with the decision.

It is dismaying that the Journal should run this story so prominently without bothering to inquire of the Administration officials responsible for the decision. The facts were available not only from us, but from the public record of the Nader group's lawsuit challenging Secretary Schweiker's decision not to issue the proposed regulation. Your article did mention this suit, but neglected to say that the suit was dismissed by the U.S. District Court last March (and is presently on appeal). The court's opinion emphasized both the Academy of Pediatrics' position and the vigorous research effort ordered by Secretary Schweiker into the relationship between aspirin use and Reye's syndrome.

Sincerely,

Richard S. Schweiker
Former Secretary of Health,
and Human Services

Christopher DeMuth
Administrator for Information
and Regulatory Affairs

George A. Keyworth
Science Advisor to the President

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

NOV 15 1989

Ms. Eleanor Chelimsky
Assistant Comptroller General
Program Evaluation and Methodology Division
General Accounting Office
441 G. Street, N.W.
Washington, D.C. 20548

Dear Ms. Chelimsky:

We are taking this opportunity to respond to your final report, Paperwork Reduction: Mixed Effects on Agency Decision Process and Data Availability, because we have serious concerns both with the validity of certain of its allegations and the quality of the methodological analyses employed. To put it succinctly, if the survey and statistical methodology used in this study had been submitted to us by an agency under the Paperwork Reduction Act, we would not have cleared it without having to work closely with agency staff to correct the methodological flaws.

As you know, we sent a letter on May 25, 1989, commenting on a draft version of the report. In that letter we stated that we found the recommendations contained in the report to be "both reasonable and consistent with our desire to further improve administration of . . . the Paperwork Reduction Act." We also pointed out that we were already taking steps to implement your recommendations and would continue to do so. However, we also took the opportunity in that letter to respond to certain allegations contained in the draft report. Since your final report did not respond adequately to the points we raised, we are amplifying and elaborating on our concerns in this letter.

There are two types of problems with the final report. First, the conclusions of the report do not follow from the data presented; and second, the report is rife with methodological problems.

The report alleges that the Office of Management and Budget (OMB) has somehow had a "chilling effect" on research. A closer look, even at the data in the report, does not bear out that allegation. The concerns raised by the General Accounting Office (GAO) report appear to be based more on the subjective views of the 17 agency staff interviewed than on the statistical analyses of the 20,497 information requests that OMB processed between 1982 and 1987. For example, the statistical analysis in the GAO report did not find that there was a "greater decline in research-oriented submissions than in statistical or regulatory requests." As Table 5.1 from the GAO report shows, while requests from "non-regulatory" -- primarily research-oriented agencies -- declined only two percent between 1982-84 and 1985-87 and statistical agency requests increased by eight percent, regulatory agency submissions decreased by 16 percent. Table 5.5 shows that research submissions from all types of agencies actually declined less than non-research submissions (six percent decline compared to a nine percent decline) over the same period.

Clearly the Office of Information and Regulatory Affairs paperwork reviews have not had a disproportionate "chilling" -- GAO's characterization -- effect on research information requests, compared to non-research requests. This conclusion is further strengthened when account is taken of the GAO report's finding (p. 21) that nearly 75 percent of the submissions from regulatory agencies are "recurrent" (that is, already approved once and thus less likely to be disapproved), while only about 60 percent of the submissions from non-regulatory agencies are recurrent.

The misconception about the "chilling" effect on research activity apparently stems in part from a selective focus on a small part of the picture rather than the total picture. Table 5.6 shows that there was a relatively large 46 percent decline in research requests from regulatory agencies that had low approval rates. The report highlights this finding. This 46 percent decline, although large in percentage terms is small in absolute terms (34 submissions). It is more than offset by the large numbers of research requests that were submitted from non-regulatory and statistical agencies and from regulatory agencies with high approval rates -- with the net result, mentioned above, that non-research information requests declined 50 percent more than research requests.

GAO also apparently believes that there is something wrong with its finding that agencies with low prior approval rates submit fewer information requests in later years than agencies with high approval rates. As mentioned, the report labels this differential decline the "chilling" effect of the OMB review process. One might ask, however, what GAO would label the effect if it had found that agencies with low approval rates tended to submit more requests than agencies with high approval rates. We believe that such a result would indicate that the review process was having perverse incentive effects. It would be analogous to a finding that drivers who were given speeding tickets drove faster after the ticket than before. The OMB review process envisioned in the Paperwork Reduction Act should have a "chilling" effect on poor design, poor planning, duplication, excessive burden, and unnecessary collections, although the term "chilling" is pejorative and we prefer the terminology used in the Act -- "paperwork reduction."

Agencies that have lower approval rates in an earlier period clearly should be submitting fewer paperworks in the future, other things being equal. GAO defined low approval rate as below 90 percent and the high rate as above 90 percent. If the disapproved requests were not submitted in the later period while the approved requests were, that in itself could easily explain the difference of nine percentage points between the requests filed by the high approval agencies and the low approval agencies. In addition, we hope that the agencies with low approval rates have learned from the review process to perform more careful internal review of their information requests for compliance with the criteria specified in Paperwork Reduction Act.

We would like to address several examples of methodological problems of a more technical nature: (1) invalid comparisons; (2) arbitrary definitions and concepts; (3) the panel of "experts" used to simulate our technical review; and (4) the use of non-probability samples.

Invalid Comparisons

We found comparisons employed in your "illustrations" that took no account of whether the processes observed were, in fact, comparable over time. One example is the comparison of recurrent and new collections in two consecutive three year periods. Arguably, recurrent surveys are somewhat similar in consecutive periods, but to presume this characteristic for "new" surveys is not appropriate.

Most new surveys are either "first-time," "one-time," or "experimental" surveys. First-time surveys in one period move to the recurrent category in the next period or are eliminated if they perform poorly. True one-time surveys occur in only one time period, and are usually associated with changes in policy (e.g., the early years of a new administration). Experimental work is often characterized by a series of two or more related collections in succession which culminate in a large scale or recurrent data collection or a decision not to proceed -- these again display the pattern of many early transactions followed by few or no actions in later periods.

There is nothing mysterious or sinister in these patterns -- they follow the life cycle of programs or program changes. A decline in new data collections between the early and later years of an administration is to be expected. Yet your analysis tacitly assumes that no change should be expected over time and proceeds to infer "chilling" effects from this flawed assumption. If this no-change assumption were true, one of the consequences would be an expansion of paperwork beyond all bounds. New research using untried methods is often more difficult than routine data collections, but difficult tasks should be met with extraordinary efforts rather than relaxed standards.

Your staff recognized that "some portion" of the new submissions reported in the early period were an artifact of the expanded coverage of the Paperwork Reduction Act, but there was no quantification of nor any adjustment made for this confounding factor. Another confounding effect ignored in your analysis is the multiplicity of transactions generated by false starts. When a survey is disapproved or given a short approval period, it often generates a second transaction on the heels of the first. As problems are resolved, the frequency of transactions decreases. This reflects nothing more sinister than the learning curve for new surveys but produces the same effect as your chilling hypothesis -- a differential reduction of "activity" over time in new areas (research) as compared with recurrent surveys (with flat learning curves).

Arbitrary Definitions

The definition of "high" and "low" approval rates appears completely arbitrary and conceptually invalid. How much real difference is there between the experience of an agency with an 89 percent approval rate and one with a 90 percent approval rate? Furthermore, your analysis shows that the average approval rate in the earlier period for "low" approval agencies was 90 percent (footnote on p. 52). Since the approval distribution is somewhat skewed in shape, this means that more than half of these selected agencies experienced "high" approval rates (above 90 percent) in the first three year period studied by GAO. One wonders how a "high" approval rate in 1982-1984 had a "chilling" effect on the later performance of these agencies. The concept of a chilling effect assumes that actions at one point in time produce a subsequent change in behavior. Your analysis is based on the subsequent behavior of agencies, the majority of which did not receive what you have defined as the chilling stimulus.

Table 5.2 shows 12 "low" approval agencies accounting for 20.2 percent of the selected submissions in 1982-1984 and 17.8 percent of submissions in 1985-1987, a difference of 2.4 percentage points. This small difference would have been erased if there had been 88 more submissions by these "low" agencies in the later period; in that case the profiles would have been identical in both periods. At the same time, tallies from "Other agencies" which showed a net increase of 113 submissions in the later period (Table 5.1) were completely excluded from the comparisons in subsequent tables. If an increase of 113 submissions is small enough to be disregarded, how can you attach such significance to a relative decrease of 88 submissions?

From another perspective, what is the probability that a group of 12 agencies showing 90 percent approval in one period (as they did in 1982-1984) would all drop below 90 percent in another period due entirely to random fluctuations? This is one version of the "null" hypothesis used to distinguish significant effects in a rigorous testing protocol. You will find that the probability is almost 30 percent -- a far cry from the level (5 percent or lower) needed to avoid spurious claims of significance. But, of course, even this simple test of significance is not valid in this case because of the arbitrary selection procedure.

Agency panel of experts

The Delphic process used to assess "technical quality" shows little understanding of our technical review. There seems to be a mystique associated with "technical quality" in your analysis which is not shared by our statisticians. They regard such technical review as a tool, one of many, for reaching the objectives of the Paperwork Reduction Act. We examine data collection plans after the design decisions have been made. No design is perfect; the question we ask is whether it is good enough to meet its purposes, and if not, whether some changes acceptable to the sponsoring agency might meet that test. Your belief "that a fair process would not treat differently agencies with submissions of similar technical quality" oversimplifies the role of technical review. What of our obligation to examine different agency needs that determine utility? Should we permit duplicate surveys if their quality is similar? Should we force the same methods on an agency facing a critical decision in six months as on an agency with the luxury of a three year research plan?

The decision paradigm imposed on your panel of experts is presumed to bear some relationship to OMB's review. Such Delphic processes are sometimes useful to rank various alternatives when experts offer conflicting opinions, but our decisions require a different intellectual discipline. Our decision process is not an opinion poll on methodological preferences. We are not constrained from asking agencies to repair omissions or justify choices that appear technically inferior. At the end of this process, however, it is the relationship of technical factors to utility and burden that drives decisions. The most professional of research plans may be useless if it does not produce its results in time to permit timely policy decisions. The somewhat pejorative distinction suggested in Table 2.3 between "technical issues" and questions of utility and burden is symptomatic of the difference between the actual decision process and the Delphic simulation. Technical issues that affect the quality of data to be collected enter directly into the determination of utility and appropriate burden; they need not be cited as separate issues. In summary, we believe your expert panel was hobbled by unrealistic ground rules and incomplete information. Their insights into particular problems are quite useful; the arithmetic mean of their quality rankings is not.

Non-probability sampling

Concerning the sampling processes used for the report, your staff admits that their samples do not support "generalization." To put it bluntly, what we have here is a throwback to methods that were discredited among professional statisticians 50 years ago. OMB's Paperwork Rule singles out "generalizability" as a critical methodological test (5 CFR 1320.6 (g)). It encapsulates an array of objective methods derived from the theory of probability and mathematical statistics. The Paperwork Reduction Act contains no explicit technical standards for data collection methods, but the test of generalizability goes to the foundation of the concept of "utility" formulated in the Act. Under our rule implementing the Act, data collected to support public policy must meet this test unless statutory requirements prevent it. We have also asserted the presumption that Congress does not "require" the use of unsound methods to collect needed data. Surely GAO should embrace this principle as well.

Finally, despite the impression left by your report, we have a well trained and experienced Statistical Policy staff that provides technical support for our desk officers. The majority of the Statistical Policy staff have advanced degrees in statistics. Most of them have twenty or more years experience in government, and ten or more years of experience in the statistical policy function (in OMB and the Commerce Department). All of them are members, and one is a Fellow, of the American Statistical Association.

The dedicated desk officers and economists who are the front line in reviewing the information collection request submissions are also highly trained in policy analysis and quantitative techniques. The majority of them have advanced degrees, are highly motivated and compare favorably with the staff of any other government agency.

Thank you for the opportunity to correct the impressions left by the report.

Sincerely,

SIGNED

James B. MacRae, Jr.
Acting Administrator
and Deputy Administrator
Office of Information
and Regulatory Affairs

Attachment 4

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 04 1989

MEMORANDUM FOR THE HEADS OF SELECTED DEPARTMENTS AND AGENCIES

FROM: James B. MacRae, Jr.
Acting Administrator
and Deputy Administrator
Office of Information
and Regulatory Affairs

SUBJECT: The 1990 Regulatory Program

I want to call your attention to the importance of timely, careful development of the Administration's 1990 Regulatory Program of the United States Government. Preparation of this document is intended to improve agency regulatory management by providing the President and his appointees a direct opportunity to review major regulatory activities planned for the coming year, to focus regulatory priorities, and to coordinate with each other.

The 1990 Regulatory Program will be the first issued by the Administration of President George Bush. While agencies did prepare draft submissions for the 1989 Regulatory Program early this year, we have decided not to issue it. The reason for this is that agency draft submissions were completed before many senior appointees to this Administration were confirmed. Thus, many appointees were not able to ensure that the 1989 Regulatory Program embodied their regulatory priorities and initiatives.

Attached is a copy of OMB Bulletin No. 90-03 that sets forth standards and procedures for publishing both the 1990 Regulatory Program of the United States Government and the April 1990 Unified Agenda of Federal Regulations. The requirements for the 1990 Regulatory Program are basically the same as before. Agencies should submit draft regulatory programs no later than January 8, 1990.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ATTACHMENT 5

An Assessment of the OMB Watch Report:

"Playing the Numbers: OMB and Paperwork Reduction: An Analysis of 1988 OMB Paperwork Decisions"

March 1990

Contents

Executive Summary

I. Introduction

II. Targeting Safety and Health Agencies

III. A Closer Look at OMB Watch Analysis: The Case of OSHA

IV. Making a Mockery Out of the APA

V. Correcting Specific Cases Cited by OMB Watch

EXECUTIVE SUMMARY

1. The conclusion that OMB "targets" health and safety paperwork is not supported by the OMB Watch analysis:

- OMB Watch's conclusions are based on selective presentation of the data. OMB Watch cites two health and safety agencies (OSHA and EPA) that appear to have more problems with OIRA than the average Federal agency. Yet 7 other health and safety agencies have fewer problems than the government average (MSHA, CPSC, FDA, NHTSA, APHIS, NRC, FSIS). By the law of averages, some agencies will be high, some low. OMB Watch cites none of the 7 "low" agencies in its report.

- OMB Watch's numbers for even EPA and OSHA are not valid. Its definition of "problem" includes many actions that do not represent disagreements between OMB and the agency. Genuine disagreements account for fewer than 10 percent of the "problems" identified by OMB Watch.

- Even if the numbers were correct, they would offer little insight into the effect of the OMB decisions on the agencies or the merits of OMB decisions. Evaluating the impact of OMB decisions on agencies requires a detailed and systematic analysis of individual decisions, which OMB Watch did not do.

2. The conclusion that OMB has, under the Paperwork Reduction Act, "made a mockery" of the Administrative Procedure Act is unsupported.

- Section 3504(h) of the PRA was explicitly intended to preserve the public participation rights of the APA.

- These provisions have been successful in coordinating PRA and APA processes. No agency rulemaking has ever been challenged in court because of alleged conflict between PRA and APA procedures.

- OMB Watch offers no examples where the PRA and APA have actually conflicted.

3. In addition, there are other errors of fact and presentation that should be corrected for the record.

I. Introduction

Each year, OMB reviews, under the criteria established by the Paperwork Reduction Act, nearly three thousand individual proposals by Federal agencies to collect information or impose other paperwork requirements on the American public. In 1988, the year selected by OMB Watch for analysis, OMB approved nearly 96 percent of these proposals, and disapproved less than 3 percent.

OMB Watch Conclusions. The merits and effects of OMB's decisions under the Paperwork Reduction Act deserve careful assessment. OMB Watch, using "for the first time...OIRA's own numbers", has attempted such an assessment in its report, "Playing the Numbers: OMB and Paperwork Reduction," and has drawn many conclusions[1], of which the most dramatic include:

o OIRA has targeted certain agencies for harsh treatment in its paperwork reviews, notably health and safety agencies. OMB Watch believes this disproportionate treatment arises from OMB's "ideological agenda."

o OIRA has, under the Paperwork Reduction Act, "interfered with notice-and-comment rulemaking" and "made a mockery of the procedural protections found in the APA."

Conclusions Unwarranted. The OMB Watch analysis is misleading and its major conclusions cited above are unwarranted. We have several fundamental concerns about the quality of the analysis, as well as concerns about numerous errors of fact and presentation.

1. The conclusion that OMB "targets" health and safety paperwork is not supported by OMB Watch analysis:

o OMB Watch's conclusions are based on selective presentation of the data. To "prove" its point, OMB Watch cites two health and safety agencies (EPA and OSHA) that have more "paperwork problems" than the government-wide average, but does not mention the seven health and safety agencies that have fewer problems than the government-wide average.

o OMB Watch's numbers for even EPA and OSHA are not valid. Its definition of "problem" includes many actions that do not represent disagreements between OMB and the agency. Genuine disagreements account for fewer than 10 percent of the "problems" identified by OMB Watch. Even genuine disagreements did not indicate any bias against health and safety.[2]

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[1] OMB has previously agreed with some of the implementation problems noted by OMB Watch and others and discussed again in this report. For example, OMB agrees that in prior years the reasons for paperwork decisions were not always adequately detailed in the public record, and OMB has taken steps to ensure that decisions are explained more fully. Similarly, OMB has occasionally failed to complete its reviews within 90 days, and this problem is being corrected.

- Even if OMB Watch corrected its numbers, this type of analysis would offer little insight into the effect of the OMB decisions on the agencies or the merits of OMB decisions. Evaluating the impact of OMB decisions on agencies requires a detailed and systematic analysis of individual decisions, which OMB Watch did not do.

2. The conclusion that OMB has, under the Paperwork Reduction Act, "made a mockery" of the Administrative Procedure Act is unsupported.

- Section 3504(h) of the PRA was explicitly intended to preserve the public participation rights of the APA.
- These provisions have been successful in coordinating PRA and APA processes. No agency rulemaking has ever been challenged in court because of alleged conflict between PRA and APA procedures.
- OMB Watch offers no examples where the PRA and APA have actually conflicted.

OMB Watch Does Not Accept "Independent Review". The report reveals more about OMB Watch than it does about OMB. What comes through clearly is that OMB Watch staff do not accept the "independent reviewer" concept in the Paperwork Reduction Act. Time and again, OMB Watch critiques OMB's decisions by simply repeating, uncritically, the sponsoring agency's original justifications or the agency's protest at the disapproval. This approach is no more than belief in each agency's ability to correctly balance its data needs against the burdens on the public.

Similarly, OMB Watch pays little attention to the substantive merits of OMB's decisions or to the costs of collecting information. The report rarely presents OMB's reasons for finding agency proposals inconsistent with the Act, or the benefits of OMB's decisions for the public. Of the 25 identifiable paperwork decisions cited in the report, for example, OMB Watch described OIRA's reasons for its decisions in only seven cases, and in only two cases did OMB Watch mention any benefits in burden reduction, improvement in data quality or cost-savings from the OMB decision.[3] Consequently, the reader of this report enters a wonderful world in which information can be collected without cost to the Federal government or burden on the public.

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[2] For example, OMB Watch listed as a "problem," indicating a bias against safety and health, an OMB instruction to OSHA that OSHA share more data on occupational accidents with other agencies doing research on the causes of workplace accidents.

In adopting the 1980 Act, Congress rejected such narrow views. It established an independent reviewer within OMB to, among other duties, assess the merits of agency proposals and to weigh the utility of information against public burden and Federal costs. This process of paperwork review by a central, independent reviewer outside of sponsoring agencies is a key component of the Paperwork Reduction Act.

The Congress recognized that reducing paperwork required an intensive, sustained effort by an independent staff trained to understand how information is used by Federal agencies, and that objective and informed judgment was needed on each one of the thousands of requirements in order to winnow out paperwork that was unnecessarily burdensome or duplicative. Disagreements were expected under this system. Despite OMB Watch's assurances that its concerns are only with the manner in which OMB carries out the Act (p. viii), OMB Watch's arguments, which feature "disagreements" rather than neutral discussions of the merits of specific decisions, are aimed at the structure and purpose of the Act itself.

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[3] For example, OMB Watch critically cites, no less than five times, OMB's decision to disapprove three requirements in OSHA's Hazard Communication Standard (HCS) (OMB was "a major obstacle" to workers' "right to know about the deadly chemicals they come in contact with on the job"), yet never mentions that the HCS was the fourth most burdensome paperwork requirement in the Federal government in 1988 (54 million hours), that OMB wrote a 14-page decision letter that discussed less burdensome alternatives, or that Congressional committees in both the House and Senate have conducted hearings critical of the paperwork burden of the HCS.

II. Targeting Safety and Health Agencies

In Chapter 2, "OIRA's 1988 Decisions: An Empirical Analysis," OMB Watch presented the basis for its conclusion that OIRA "is preoccupied with limiting collection of information in health, safety and environmental areas, while rarely questioning Internal Revenue Forms, which represent the largest burden on the public...." OMB Watch's empirical analysis took four steps:

1. First, OMB Watch defined disapprovals, agency withdrawals, and proposals deemed "improperly submitted" as "problems" with OIRA.

2. Second, OMB Watch ranked 21 agencies from lowest to highest by the percentage of proposals that had "problems." EPA and OSHA were highest, with 15.5 percent and 13.8 percent. The next five highest were not safety and health related: FEMA (10.7 percent), Census (9.7 percent), Department of Justice, Department of State, and Department of Defense. The governmental average for "problems" was 4.3 percent. HHS, a safety and health agency, was below average, with a 3.1 percent "problem" rate. OMB Watch concluded this table with the point: "Note that paperwork submitted by EPA and OSHA is more than three times more likely not to be approved than the average government information collection proposal."

3. Third, OMB Watch more than doubled the number of "problems" by adding "short-term approvals (approvals for less than six months) to the definition of "problems." The agencies were ranked again. This time, OSHA was highest, followed by HUD, the Justice Department, EPA and the Labor Department. HHS remained below the government average.

4. Fourth, OMB Watch compared problem rates with burden imposed on the public, and found that the Departments of Treasury and Defense impose the largest paperwork burdens on the public, but have "problem" rates lower than the government average, while HUD, EPA and Labor impose relatively less paperwork burden, but have high "problem" rates.

In these results, OMB Watch finds corroboration for its long-held view that OIRA has targeted health and safety activities due to an "ideological agenda."

Below is an assessment of the merits of the OMB Watch concerns. In summary, there is no basis to the allegation of bias against health and safety, either generally or with respect to OSHA, the "worst-case" found by OMB Watch. The numbers presented by OMB Watch are not valid, and, in any case, this type of analysis offers little insight into the impact of OMB decisions on the agencies or into the merits of those decisions.

A. SELECTIVE PRESENTATION OF THE DATA

When we looked more closely at the OMB Watch Analysis, we discovered that the conclusions are based largely on selective presentation of the data. In the table presented by OMB Watch ranking 21 Federal agencies and Departments by the percentage of paperworks disapproved by OMB or withdrawn by the agency (p. 8), only two health and safety agencies are shown, EPA and OSHA. These two are at or near the top of the list, above the government average. OMB Watch concluded that "health and safety" agencies are targeted.

What is missing are the other health and safety agencies. OMB Watch does not include in its table (or otherwise mention in its report) the seven other health and safety agencies that have fewer paperwork disapprovals or withdrawals than the government average (Mine Safety and Health Administration, Food and Drug Administration, Consumer Product Safety Commission, National Highway Traffic Safety Administration, Animal and Plant Health Inspection Service, Nuclear Regulatory Commission, and Food Safety and Inspection Service). Using the OMB Watch logic, we could use these seven agencies to conclude that "OIRA is biased in favor of health and safety agencies," but that conclusion would also be unwarranted.

By the law of averages, some agencies will be high, some low. OMB Watch cited the two that were high, but did not tell its readers about the seven that were low. As a result, the OMB Watch "analysis" is misleading and its conclusions unwarranted.

B. DEFINITION OF "PROBLEM" IS MISLEADING

OMB Watch's definition of "problem" obscures the nature of the OMB decisions and their impact. Our review shows that the majority of these "problem" actions did not, in fact, affect agencies' ability to collect information, and did not otherwise reflect disagreements between OMB and the agencies.

OMB Watch defines all disapprovals, withdrawals, improper submissions, and approvals for less than six months as "problems with OIRA." We agree that "disapprovals" are "problems" in that they reflect genuine disagreements between the agency and OMB, but disapprovals account for less than 10 percent of the "problems" identified by OMB Watch. When OMB Watch counted only disapprovals and withdrawals by subject area (p. 16), it found that "safety and health" paperworks have a "disapproval rate" (a misnomer, since about half of these were withdrawals) of 5.2 percent, compared to 4.1 percent for all government, a much less dramatic difference than OMB Watch found by using more expansive definitions of "problem" and looking only at single agencies. OMB Watch does not cite this finding in the text of the report. Even this figure, however, offers little information on how these actions affected the agencies -- an issue that requires more sophisticated and detailed analysis than is attempted by OMB Watch in this report.

Following is a discussion of why actions other than disapprovals should not automatically be counted as "problems" between OIRA and the agencies:

> Withdrawals: OMB Watch considers that an agency request to withdraw a paperwork from OMB review is always the same as an OIRA disapproval because "most often, agencies are forced by OIRA to withdraw their requests --in effect, a disapproval" (p. 8). Although this assertion is repeated throughout the report, OMB Watch presents no evidence or analysis of the 48 withdrawals in 1988 to document it. Although OMB Watch states, "Admittedly, not every agency withdrawal is forced by OIRA" (p. 8), the analysis assumes exactly the opposite.
>
> OMB's experience is that while agencies occasionally withdraw paperworks to avoid the embarassment of an OMB disapproval and public critique, agencies also withdraw paperworks for many good reasons: for revision, for testing, for coordination with other agencies, for further review by policy officials, or for later resubmission with another related action, such as a companion survey or rulemaking.
>
> In 1988, for example, EPA withdrew four related paperwork packages from OMB review in order to consolidate them into a single package for simplification. In 1988, OSHA withdrew a survey from OMB review because a court order made it impossible to conduct the survey in the time available. In 1990, EPA withdrew four other paperwork packages because publication of the Federal Register notices to the public was delayed, and the public comment period would have been cut short. These withdrawals are not "problems with OIRA" as most people would understand that phrase.
>
> Improper submissions: OIRA returns to the agencies paperwork packages that do not comply with the formal requirements for submission. There is no substantive review of the package. Some packages, for example, are not signed by authorized officials. Others do not have the correct OMB number. One of the OMB "problem" decisions included in the OMB Watch analysis for 1988 was OMB's return of an OSHA submission because the agency failed to include the public disclosure statement required by 5 CFR 1320.21. The agency corrected the package and resubmitted it for review. Improper submissions are indications of quality control within the agencies, not disagreements with OMB.
>
> Approvals less than six months: In the overall statistics cited by OMB Watch, short-term approvals make up more than

half of the "problems." Short-term approvals for less than six months are "problems," OMB Watch argues, because "a short-term approval is often a good indicator of OIRA's opposition to a proposal. Simply, the more times OIRA gets to review a proposal, the more it can try to shape it." Although OMB Watch acknowledges that "much greater research is needed about OIRA short-term approvals and the content of those decisions" (p. 10), this caveat vanishes in the analysis and short-term approvals are de facto treated as "problems".

The reality is more complicated. It is certainly true that OMB gives some short-term approvals because of unanswered questions. These short approvals allow agencies additional time to justify their proposals, and are intended to avoid disapprovals on the basis of the inadequate justification under review. In these cases, short-term approvals allow agencies to continue collecting information until they are able to submit a stronger justification. In this way, OMB often gives agencies additional opportunities to revise their submissions, without disrupting ongoing collections.

Short-term approvals are often granted for other reasons, as well, including agency requests for shorter approval periods because of upcoming events such as a rulemaking that will affect the paperwork under review or the fact that a one-time information collection will be completed quickly. As a general matter, and as required by the Act, OIRA will not approve the collection of information for longer than the collection is needed. Short-term approvals are certainly not reliable indicators of OMB-agency "problems."

C. OMB WATCH APPROACH OFFERS LITTLE INSIGHT

Even if OMB Watch corrected its numbers, this type of analysis would offer little insight into the effect of the OMB decisions on the agencies or the merits of OMB decisions. Evaluating the impact of OMB decisions on agencies requires a detailed and systematic analysis of individual decisions, which OMB Watch did not do.

Agencies differ in many ways, and an awareness of those differences is important to accurately interpret statistics on OMB paperwork decisions.

- Some agencies conduct more short-term surveys that only need short approval periods.

- Some agencies undergo periods in which Congressional activity is intense, so they may withdraw proposals from OMB review in order to account for new statutory requirements (HUD is a good example).

- Other agencies propose a higher percentage of new information collections, which, because they are under review for the first time, have a higher disapproval rate. In 1988, for example, 31 percent of OSHA's submissions and 34 percent of EPA's in 1988 were new, compared to 24 percent for the IRS, most of which were required by statute.

- The public comments more often on some paperwork requirements than others (OMB Watch notes elsewhere in this same report (p. 50) that the public comments more often on OSHA regulatory paperwork than on most other paperwork requirements, but OMB Watch does not draw a connection between this and OMB decisions on paperwork).

- Some agencies engage in more rulemaking than other agencies, and must coordinate the approvals of existing and new paperwork requirements.

It has also been our experience that some agencies seem to give more attention to the Paperwork Act than others. OMB Watch is troubled (p. 15) by the fact that the Internal Revenue Service has a lower "problem" rate than other agencies, although the burden IRS imposes is very large. To OMB Watch, this is evidence that OMB is less harsh with tax forms. This conclusion misses the point that agencies, not OMB, have primary responsibility for carrying out the Act, and some agencies do better than others. As noted elsewhere, the IRS, aware of the tremendous paperwork burden of tax forms, has instituted a rigorous internal review process that usually produces information collection proposals consistent with the Paperwork Act, given the technical complexities of tax issues and the explicit and detailed requirements of the tax laws.

The point is that, even if a legitimate measure of "problems" is used, evaluating different "problem" rates is a sophisticated activity that must account for the environment in which an agency operates and the way it does its job. It is not justifiable to assume, a priori, that OMB should find more problems with paperwork proposals from agencies that impose larger paperwork burdens.

III. A Closer Look at OMB Watch Analysis: The Case of OSHA

OMB Watch presents many numbers to support its positions, but presents little discussion of the actual cases behind these numbers. Below, we take a closer look at OMB's 1988 paperwork decisions for the Occupational Safety and Health Administration (OSHA), the agency that OMB Watch stated was the worst-treated of all by OMB: "...**nearly one of every two OSHA paperwork proposals had trouble at OIRA during 1988**," states OMB Watch (p. 15, emphasis in the original, but also see the less dramatic statement on p. 9: "one in three submissions from OSHA runs into some type of trouble at OIRA"). OMB Watch uses this statement as support for its conclusion that OMB's paperwork reviews "target" safety and health agencies for ideological reasons.

A closer look at the actual OSHA paperworks and OMB decisions, however, tells a very different story. The "problems" that OMB Watch has identified are, it turns out, mostly efforts by OMB to manage a complicated approval process without disrupting agency information collections, attempts by OMB to improve data, or agency decisions to request short-term approvals or withdraw paperwork proposals from OMB review. Genuine disagreements between agencies and OMB on the merits of a paperwork proposal make up only a small portion of what OMB Watch has categorized as "problems."

First, OMB Watch presents two inconsistent sets of statistics, and both need to be corrected:

	OMB Watch Statistics		OIRA Statistics
	p. 9	p. 15	
Total OSHA Paperworks Reviewed	29	29	35
Total Approved > 6 months	18 (62%)	16 (55%)	21 (60%)
Total Approved < 6 months	6 (21%)	9 (31%)	10 (29%)
Total "Not Approved"	4 (14%)	----	----
Total Disapproved	-----	1 (3%)	1 (3%)
Total Withdrawn	-----	3 (10%)	2 (6%)
Total Improperly Submitted	-----	0 (0%)	1 (3%)

OMB Watch acknowledges that disapprovals of OSHA paperwork accounted for only 3 percent of the decisions (about the average for the government as a whole), but OMB Watch states that any action other than an approval for greater than six months reveals a "problem" between OMB and the agency. For its analysis, OMB Watch simply added up the disapprovals, withdrawals, and approvals for less than six months, obtained 44 percent, and concluded that "almost half" of OSHA's paperworks had problems at OMB. A more detailed look is in order.

OSHA Withdrawals: A closer look at the two OSHA withdrawals in 1988 shows that the withdrawal actions were, in fact, good management of the agency's information resources. One such action involved a survey to collect economic data from several industries that use lead. OSHA withdrew this survey from OMB review because OSHA had determined, in the face of a court deadline, that it had time to visit only eight firms to collect data. OSHA did not need OMB approval to visit eight firms. The other instance involved a survey to collect economic data for a proposed rule on bloodborne diseases. OSHA withdrew this survey because it had not yet decided to proceed with rulemaking, and the data would have no use to the agency until the decision was made. In 1989, after OSHA decided to proceed, OSHA submitted and obtained approval for an improved survey based on the actual proposal that will provide data needed for the final rule. In neither case was agency withdrawal a "problem" between OMB and the agency.

OMB Short-term Approvals of OSHA Proposals: In the OSHA case, ten paperworks were approved for less than six months. OMB Watch, which listed nine, provided no description of these cases. Our review of the records shows that:

- Two were short-term surveys for which OSHA requested less than six months. No longer approval period was needed.
- Five were approvals of existing or proposed paperwork for which final rules that would amend the existing requirements were expected within six months. In one case, OMB filed comments on paperwork requirements in a proposed rule and subsequently approved the paperwork in the final rule. In the other cases, OMB approved the existing paperwork requirements for the time needed for the agency to issue revised requirements. The short approval periods in these cases did not affect at all the agency's ability to collect information, but they did improve coordination between the old and new rules by ensuring that only one set of paperwork requirements was approved at any one time.
- One was for a survey for which OSHA did not have sufficient time to redesign the survey form while it was under OMB review. To allow OSHA to initiate contacts with the public without delay, OMB approved the survey for a short period,

then reviewed and approved the revised survey form at a later date. The short approval period allowed OSHA to proceed immediately with letters to the respondents; while observing the requirements of the Act that OMB approve the final form.

- One was to allow OSHA additional time to explain why the burden of a paperwork requirement had tripled -- increasing by 90,000 hours each year -- since OMB's previous review. The agency subsequently submitted a more detailed explanation (OSHA staff had decided that many more businesses were affected) and OMB approved it for three years.

- One short-term approval did, indeed, arise from a disagreement between OMB and OSHA. The paperwork was "Fatality/Catastrophe Reporting," under which employers report to OSHA the death or multiple injury of employees. This information is important to OSHA enforcement, investigations, and collection of information about the causes of accidents. OMB's comments explaining the short approval, which OMB Watch did not mention in its report, shed light on decisions to approve some information collections for a shorter period than the agency requests:

> "We have cleared this collection of information for four months in order to allow additional time for interagency coordination on information collected in the course of fatality/catastrophe reporting and follow-up investigations., These reports and investigations represent a unique opportunity to gather primary evidence on the causes of workplace fatalities. It is important that the Federal resources used to collect this information yield information of maximum use to the collecting agency and to other Federal agencies who could use these data for occupational safety research."[4]

In this case, OMB used a short-term approval to press the agency to improve the usefulness and sharing of data on occupational accidents.

This case-by-case analysis reveals a very different picture of OMB's role as an independent reviewer. Rather than OMB and OSHA disagreeing on "almost half" of OSHA's paperworks, genuine disagreements arose in only about 10 percent of all cases. Rather than being ideologically opposed to collecting information about injuries and illnesses, OMB pressed for improved coordination and use of information on occupational accidents. Rather than limiting the collection of information on the workplace, none of these actions prevented OSHA from collecting needed information. And, finally, even in cases where there was genuine disagreement, there were, not surprisingly, two sides to the issue, and we believe that disagreement and the resolution of the disagreement were necessary to achieve the purposes of the Act.

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[4] OMB Notice of Action dated 9/19/88, OMB Control Number 1218-0007.

IV. Making a Mockery out of the APA

The 1980 Act, as enacted, contained provisions in section 3504(h) that were explicitly intended to preserve public participation rights under the informal rulemaking provisions of the Administrative Procedure Act (APA). Briefly, these provisions require OMB to comment publicly on paperwork requirements in proposed rules, require the agency to respond to the OMB comments in the final rule, and allow OMB to disapprove paperwork in the final rule only if the Director finds that the agency's response to OMB's comments was unreasonable. These procedures were intended to prevent OMB from disapproving paperwork in a final rule if it had not objected to that paperwork on the record at the proposed stage. If OMB questions paperwork in an existing rule, it cannot disapprove that paperwork until it has given the agency time to initiate notice-and-comment rulemaking under the APA.

Since the PRA's inception, these provisions have, in our experience, been successful in coordinating the public participation rights of both Acts. In virtually every case, paperwork issues raised by OMB at the proposed stage have been resolved at the final stage and OMB has approved the paperwork. In only a very few cases, has OMB disapproved paperwork in a final rule. Paperwork in existing rules has, without exception, been revised through notice-and-comment under the APA, giving the public full opportunity to express opinion on all sides. At no time has any agency rulemaking been challenged in court because of alleged conflict between APA and the PRA procedures.

OMB Watch believes, however, that the PRA procedures "make a mockery of the procedural protections found in the APA" (p. 24). OMB Watch offers no example in which APA procedures were actually violated by an OMB paperwork decision; instead, OMB Watch explains only that OMB can disapprove, under section 3504(h), paperwork in a final rule. Yet these provisions were established precisely to safeguard APA procedures. OMB Watch also says that "it is quite possible for the OIRA decision to run counter to public opinion, making the agency's public comment period under the APA meaningless. This has happened more than once at OIRA." (p. 24). Yet once again, no specific cases are cited where this actually happened.

In light of ten years of success with coordinating APA and PRA procedures, we do not understand the basis for allegations that they are somehow inconsistent. We are ready, however, to examine any specific examples that may be brought forward in order to determine if a problem does exist.

Although OMB Watch goes on to describe six cases in which OIRA "interfered" with agency rulemakings "before," "during," and "after" rulemaking, no further mention of the APA is made.

Instead, OMB Watch's concerns seem to be based on disagreement with the merits of the decisions, although again OMB Watch does not provide OMB's reasons for its decisions so that readers can reach an informed judgment.

V. Correcting Specific Cases Cited by OMB Watch

The OMB Watch report, "Playing the Numbers," cites 25 identifiable OMB decisions. Several are cited more than once. Without exception, OMB Watch was critical of the 25 OMB decisions. Although the report is subtitled, "An Analysis of 1988 OMB Paperwork Decisions," only about half of the 25 are 1988 decisions; the others occurred as early as 1984 up through 1989. Many of these OMB decisions are cited again in the OMB Watch "Special Report" of August 2, 1989, entitled, "Can a Leopard Change Its Spots?" together with a few other decisions.

In some cases we feel that readers have adequate information on the OMB decision to assess the validity of OMB Watch's point, but in other cases the information presented is incomplete or incorrect. Below, we correct several of these cases.

We note that the OMB Watch report is characterized by imprecise references to OMB decisions that often make it difficult to determine what is being discussed. For example, in the Executive Summary, OMB Watch states that OMB has used the Paperwork Act to "limit the health and safety reporting required in dangerous fields such as mining," but specific decisions illustrating this are not mentioned anywhere in the report.

1. NIOSH VDT STUDY (pp. ix, 52)

OMB Watch's discussion of the NIOSH VDT study simply repeats old criticisms and ignores OMB's lengthy responses, which are in the public record, to other critics of this decision by OMB.

o OMB Watch correctly states that OMB disapproved in December 1985 the NIOSH study of potential adverse reproductive effects from emissions from video display terminals.

  Response. OMB Watch does not state the reasons why. OMB disapproved the study because OMB's statistical experts found that "it would have imposed unnecessary reporting on respondents and ... it lack practical utility" due to several methodological deficiencies that would have affected the validity of study findings. OMB Watch does not cite or assess the methodological shortcomings found by OMB.

o OMB Watch correctly states that OMB later approved the survey on the condition that NIOSH delete questions on work stress and fertility.

  Response. OMB Watch gives no indication of OMB's reasons for doing so. OMB instructed NIOSH to (1) delete questions about fertility because the protocol contained no hypothesis relating fertility to VDT exposure and because the study did not have the statistical power to test any such hypothesis; and (2) delete questions about stress because, again, there was no hypothesis regarding stress and adverse pregnancy outcomes, the study could not control for stress in the analysis, and the questions would have significantly increased interview time and could have adversely affected the response rate.

o OMB Watch states that "the deletions came at the suggestion of Bell South, a company that had been quite influential -- and critical -- during the paperwork review process."

  Response. This charge is probably based on the fact that OIRA received public comments from Bell South (a studied firm) raising some of the same concerns that OMB raised. OMB has previously stated that OIRA reached its conclusions independently of Bell South, and in fact disagreed with Bell South on several points.

o OMB Watch states, "The result was a study smaller in scope...but more expensive (about double the original cost."

  Response. OMB Watch does not tell the reader that the increased cost was largely due to OMB's requirement that medical records be checked to improve confidence in the responses. No one has criticized this OMB decision, apparently agreeing that it improved the study design.

- OMB Watch paraphrases the Office of Technology Assessment as concluding that "OIRA's deletions significantly undermined the study."

Response. We disagree. OMB's actions were necessary because of the serious statistical deficiencies that had been identified in the study. Even studies that have gone through extensive peer review can contain flaws. OMB staff are well qualified to assess questions of statistical methodology, and a number of statisticians and scientists, in reviewing OMB's actions on the VDT study, have concluded that these actions were appropriate and proper statistical policy questions.

2. OSHA HAZARD COMMUNICATION STANDARD (pp. ix, 11, 37, 51, 53, Special Report)

OMB Watch is critical of OMB's disapproval of three paperwork requirements in the generic Hazard Communication Standard (HCS) promulgated by the Occupational Safety and Health Administration (OSHA) in 1987.

Response. The pros and cons of OMB's decisions on this complex regulation cannot be dealt with here in any detail. Yet OMB Watch does not even mention in its report that OMB issued a 14-page document discussing the reasons for its decisions and proposing less burdensome alternatives, does not mention that the HCS was the fourth most burdensome paperwork requirement in the Federal government in 1988 (OMB approved HCS paperwork requirements that imposed 54 million hours of paperwork), and does not mention that Congressional committees in both the House and Senate have conducted hearings critical of the paperwork in the HCS. Senator Bumpers, for example, has said that the HCS, even as approved by OMB, is "unnecessarily burdensome, unnecessarily expensive, and simply must be revisited." (see S. Hrg. 101-153, June 22, 1989, p. 146).

As a result of OMB's review of the HCS, several actions were taken on the HCS. These actions -- disapproval of unjustified paperwork, provision of a compliance assistance program for the public, and initiation of a rulemaking to consider less burdensome alternatives -- flowed directly from the public participation process established by the PRA. We think they are good results. As a result, paperwork burdens will be simplified and reduced with no loss in worker protection.

3. EPA SURVEY OF PESTICIDE MANUFACTURERS (pp. 11, 29, 37, Special Report)

OMB Watch cites OMB's decision to disapprove the financial portion of an EPA survey, "Pesticide Manufacturing Facility Census," to illustrate two important allegations:

(1) OMB uses paperwork decisions to undermine rules. OMB Watch notes that EPA needed information to help it write new effluent guidelines that would withstand court challenge. But initially OMB disapproved the financial section of the survey, and later approved the financial section "only on the condition that it make certain parts optional." OMB Watch gives none of OMB's reasons for its decision, but does quote an unidentified "environmentalist" that OMB's decision "basically denied EPA a chance to 'obtain the very information, at the very level of detail, that industry complained EPA lacked to support the previous pesticide rule.'"

Response. This is simply incorrect. Most of the information needed to support the previous pesticide rule was technical, not financial, and was approved by OMB in its initial review. OMB never questioned that EPA needed financial data, but did believe that the level of detail, which had never before been collected for other EPA rules, was unnecessary. In addition, EPA had pretested the technical portion of the survey, but not the financial portion. The survey approved by OMB imposed one-half the burden of the original survey, but fully met the statutory needs of EPA. EPA itself stated in the record, "We believe that EPA can develop a defensible and appropriate effluent guideline regulation based on information supplied in accordance with the modification suggested...."

(2) OMB gives privileged access to special interest groups in the paperwork review process. OMB Watch cites a meeting called by OMB in which "industries interested in the proposal" were invited, but no "environmental groups," even through one environmental group "had expressed an interest in the census."

Response. The meeting was indeed called by OMB. OMB Watch does not mention, however, that it was a final follow-up meeting to three earlier meetings hosted by EPA and open to the public, and that all the participants of the EPA meetings were invited to summarize their views. Apparently, environmental groups did not attend any of these earlier meetings. OMB did not canvass the general public to find interested groups who had not participated in these public meetings.

4. CENSUS SURVEY OF BUS COMPANIES (pp. 14, 17, Special Report)

OMB Watch complains that "OIRA thought the survey should be voluntary, although industry trade associations expressed the need for it to be mandatory."

Response. We did not agree with the industry trade association. Since OMB Watch criticizes OIRA in this same report for agreeing with industry trade associations on other paperworks, we do not see why OMB Watch wants OIRA to defer to industry associations in this case. In this case, we agreed instead with the Small Business Administration.

5. OSHA BLOODBORNE SURVEY (pp. 24, 26)

In January 1988, the Department of Labor withdrew from OMB review a survey that would collect economic data to support a rulemaking on bloodborne diseases. OMB Watch states that OIRA forced OSHA to withdraw the survey and that "OIRA brought OSHA work [on the bloodborne rule] to a dead halt by preventing the agency from collecting information." OMB Watch uses the example to illustrate how "OIRA has used the Act to go after regulations."

Response. Although OMB Watch says dramatically on p. 24 that the withdrawal brought the rule to a "dead halt," on p. 26 OMB Watch notes that OSHA published the proposed rule without the survey.

In fact, the Department of Labor withdrew this survey from OMB review in March 1988 because the survey was intended to collect financial and exposure data to develop an NPRM if the agency decided to proceed with rulemaking. Since the agency had not yet decided to proceed with rulemaking, and the data would have no use until the agency decided to proceed, the Department withdrew the survey. In 1989, after OSHA decided to proceed with the rulemaking, OMB approved two OSHA surveys on bloodborne diseases that were based on the proposed rule and that will collect data necessary for the final rule.

6. OSHA SURVEY ON ATA (p. 25)

In 1988, OMB disapproved an OSHA survey that was intended to collect data on company finances, employee exposures and industrial processes for the purpose of assessing the regulatory impact of a proposed rule on ATA (three nonasbestiform minerals). OMB Watch states, "OIRA brought OSHA work [on the ATA rule] to a dead halt by preventing the agency from collecting information." OMB Watch uses the example to illustrate how "OIRA can also use its paperwork powers to stop agency work on regulations."

Response. OMB Watch implies that the survey was needed to regulate ATA. The truth is the opposite. The rulemaking contemplated by OSHA would have deregulated ATA by removing it from the existing very stringent asbestos rule and regulating it as a less hazardous substance.

Our reasons for disapproving the survey are not mentioned by OMB Watch, but illustrate some of the issues with which OMB deals in Paperwork Reduction Act reviews. OMB disapproved the survey because another Labor agency, the Mine Safety and Health Administration, was also considering regulatory action on ATA, and needed similar information. Our disapproval stated:

> ...the information needs of the Department on similar issues should be integrated and efforts to satisfy those needs should be coordinated so that the cost to the Federal government and the burden imposed on the public is minimized. We understand that the coordination effort is proceeding between MSHA and OSHA, but is not completed...We urge the Department, however, to resubmit this survey, suitably revised, when it has identified the totality of its information needs on ATA and the utility of this survey in meeting those needs.

Clearly, a firm that was visited one week by OSHA and the following week by MSHA to collect identical information would have had a legitimate complaint about the waste of his time and that of the agencies.

7. OSHA SURVEY ON LEAD-USING FIRMS (p. 25)

In February 1988, the Department of Labor withdrew from OMB review a survey to collect economic data from lead-using industries to respond to a court order. OMB Watch states that OIRA forced OSHA to withdraw the survey and that "OIRA brought OSHA work [on the lead rule] to a dead halt by preventing the agency from collecting information." OMB Watch uses the example to illustrate how "OIRA has used the Act to go after regulations."

Response. The Labor Department withdrew this survey from OMB review because OSHA had determined, in the face of the court deadline, that it had time to visit only eight firms to collect data. OSHA did not need OMB approval to visit eight firms. OSHA met the court deadline.

8. OSHA PROPOSED PAPERWORK FOR BLOODBORNE RULE (p. 27)

OMB Watch uses OSHA's proposed rule on bloodborne diseases as a case study of how "OIRA interferes with Agency Proposals Before Rulemaking." OMB Watch states, "On July 28, 1989, OIRA disapproved the paperwork contained in the standard. OIRA singled out 'exposure determinations,' written infection control plans, training records, a 'housekeeping' provision, and the requirement that employers keep a copy of the bloodborne standard in each employee's medical file as problematic."

Response. OMB did not "disapprove" the paperwork in the standard. Rather, OMB filed comments, pursuant to section 3504(h) of the Paperwork Act, on paperwork in a proposed rule. No final rule has yet been issued.

OMB Watch did not mention OMB's reasons in the record for raising concerns about the paperwork. Many commenters to the public record were concerned that the paperwork was voluminous and unnecessary. Saint Thomas Hospital in Tennessee, for example, stated, "Although we strongly support the intent and much of the content of the proposed regulation, some of the information collection and recordkeeping provisions are burdensome and unnecessary; they increase costs of compliance without in any way adding to the protection of employees."

We asked OSHA to consider less burdensome alternatives for the final rule. For example, for the proposed provision requiring an exposure determination for each employee, we asked OSHA to consider the evaluation of employees in groups such as "emergency room nurses." This approach would avoid what Frankford Hospital in Philadelphia called, "a tremendous paperwork burden...." In addition, we asked OSHA to consider tailoring the paperwork requirements for small businesses. The paperwork necessary for a 1,000-bed hospital, for example, may be more than is needed for a two-person dental office.

9. EPA VAPOR DEVICE REPORTING (p. 27)

OMB Watch states that OMB "disapproved" a reporting requirement related to vapor refueling devices on cars and that OMB based its arguments on a study conducted for motor vehicle manufacturers by a former OIRA official. This example, says OMB Watch, shows how "OIRA Interferes with Agency Proposals During Rulemaking."

Response. OMB did not "disapprove" the paperwork in the rule. Rather, OMB filed comments, pursuant to section 3504(h) of the Paperwork Act, on paperwork in a proposed rule. In addition, contrary to OMB Watch's assertion, the public record clearly shows that OMB's comments were based on questions raised by the National Highway Safety Administration in the Department of Transportation, as well as on comments submitted by several organizations.

10. BUREAU OF MINES MONTHLY INDUSTRIAL MINERALS SURVEY (p. 31, Special Report)

To illustrate "how little [OMB] Desk Officers may actually know about the subject involved in a particular proposal they are supposed to evaluate," OMB Watch cites OMB's disapproval of a requirement that industries report monthly on the use of several minerals. According to OMB Watch, "Bureau of Mines officials told OMB Watch that they had to spend a lot of time during the review educating 'the people at OIRA who had no appreciation for the minerals business' and 'explain in writing the nature of the business and who uses the information.'"

Response. OMB disapproved the survey because the Bureau had not justified why monthly, as opposed to quarterly or annually, reporting was necessary. More frequent reporting, of course, is more costly than less frequent reporting for both the respondents and to the Federal government, which must expend resources and people to handle the data. For that reason, the implementing regulations to the Paperwork Reduction Act state, "Unless the agency is able to demonstrate that such collection of information is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection of information...requiring respondents to report information to the agency more often than quarterly" (5 CFR 1320.6(a)).

OMB stated on the record, "Stating that industry maintains the information in a monthly format is not adequate justification, as the firm can easily aggregate the monthly data to quarterly." OMB also raised additional questions as to who used the data and how it was used.

In its response, the Bureau of Mines indeed explained "in writing the nature of the business and who uses the information," as OMB Watch points out. This is precisely what the Paperwork Reduction Act requires. Independent review is effective only if the reviewer understands those issues. The Bureau also explained why monthly data were needed for each mineral. OMB then approved the survey for the full period allowed by the Act.

11. DRESS REHEARSAL FOR 1990 CENSUS (pp. 31, 50, 51, Special Report)

OMB Watch states that OIRA "raised questions" about many of the questions for the dry run, which were perceived as "mandates for change"; that OIRA waited until the last minute, although OIRA had had ample opportunity early in the process; and that, even though OIRA partially "relented" six months later, OIRA's actions wasted time and money for the Census.

Response: For several years, OMB had participated in review of Census tests and interagency discussions covering many more questions than could be included in the Census. The questionnaire for the "dress rehearsal", submitted in June 1987, provided the first opportunity for OMB to examine the final cut proposed by the Census Bureau. After a careful review, OMB found that some of the decisions on inclusion or placement of particular questions on the short or long forms were not consistent with test results or with recommendations of the other agencies and the GAO.

OMB also found that more efficient statistical designs developed by Census Bureau staff had been inadequately considered in the rush to meet the target date for the dress rehearsal.

OMB advised the Census Bureau of these problems early in the review to allow them time to supplement their justification. OMB also provided a list of questions to focus their efforts. For various reasons, the Census Bureau could not address these problems within the 90 days allowed for review under the Paperwork Reduction Act. When OMB found that Census Bureau summaries of public and agency inputs failed to justify some of the specific decisions in the plan, it took the step of formally soliciting comments well in advance of the statutory deadline for the decision. Since numerous public comments and comments solicited from agencies also failed to resolve some of the issues (such as public resistance to providing data used for housing code enforcement), the initial submission was disapproved.

An improved plan was submitted and approved within weeks of the initial disapproval with the understanding that shortcomings in prior testing would be addressed as far as possible in the dress rehearsal itself. The improved plan included a variable rate design (dependent on population density) that equalized precision in rural and urban areas and was approximately twice as efficient as the design proposed in June (it reduced the sample size required to reach the overall precision target proposed by the Bureau from 16 million to about 8 million.)

OMB proposed that the Census Bureau expend part of the resources freed by this efficiency gain to improve precision (a larger sample of 10 million -- equivalent to a fixed rate sample of 20 million) and use the remaining freed resources to improve respondent followup (which was ineffective to some degree for 45% of 1980 Census household records.) The objectives of content changes were to improve both response and utility, while the sample size recommendations would allow more complete followup, thus reducing the burden of the census and improving the accuracy of the data.

Within days of the dress rehearsal date, however, a letter to the President from 28 Representatives and Senators, criticizing OMB's role in reviewing the dress rehearsal, forced an immediate decision. Lacking the analysis that might have resulted from the dress rehearsal, a compromise was reached based on existing information. The Census Bureau adopted the more efficient variable rate design endorsed by OMB, and OMB accepted a larger sample and additional questions based on assurances from the Commerce Department that this could be done without risk to the accuracy of the count.

Since this action, OMB has continued to work with the Census Bureau and the Department of Housing and Urban Development to develop methods for correcting some large, well-documented biases in responses to certain Census housing questions. These methods rely in part on an unbiassed technique, developed by the Energy Information Administration for measuring energy and related utility costs, which can correct aggregate bias across large regions using sample data collected by EIA and HUD, but cannot correct the large Census bias that has historically prevented publication (and thus analysis) of such data for most smaller geographic areas.

12. MSHA INJURY AND ILLNESS REPORTING (pp. 36, 37, Special Report)

OMB Watch states: "An OIRA official met with industry representatives at their request, despite the fact that MSHA staff refused to do so...In the end, OIRA forced MSHA to speed up the process of studying whether to change or eliminate the reports, in effect forcing the regulated community's will on the agency."

Response. An OIRA desk officer did meet with a representative of a trade association to discuss the MSHA paperwork under review. That is our duty under the Paperwork Reduction Act, which requires that OMB give the public "early and meaningful opportunity" to comment. We meet with any member of the public who wishes to provide comments, and in fact encourage such input wherever possible. We should note that the written comments of the trade association were placed into the public paperwork record, as well as the fact of the meeting.

Secondly, the charge that OMB "forced MSHA to speed up the process...in effect forcing the regulated community's will on the agency" is just wrong. In fact, OMB deferred to MSHA, contrary to the recommendations of the particular trade association.

OMB approved the paperwork for one year and instructed MSHA to publish, within the year, an advance notice of proposed rulemaking (ANPRM) "soliciting comment on this form...." But MSHA had already scheduled an ANPRM on this paperwork for publication early in the year.[5] The ANPRM was MSHA's idea, not OMB's. The trade association wanted faster action, such as publication of a notice of proposed rulemaking (NPRM). Far from "forcing" MSHA to take action, OMB's action reaffirmed MSHA's existing schedule and plan of action and rejected the trade association's position.

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[5] Unified Agenda of Federal Regulations, April 25, 1988 (53 FR 14005).

13. OSHA Formaldehyde (pp. 27, 28, Special Report)

OMB Watch states that "OIRA forced OSHA to remove from the rule any provision that would require employers to tell their workers that formaldehyde might cause cancer."

Response. The allegation implies that OMB disapproved the hazard communication requirements for formaldehyde, including the cancer warning. This is untrue, as even a cursory examination of OMB's five-page letter to OSHA would have revealed. OMB disapproved the hazard communication requirements in the Formaldehyde Standard in order that the broader Hazard Communication Standard would continue to apply to formaldehyde. In fact, as OSHA stated on the record, the Hazard Communication Standard requires more hazard warnings than the Formaldehyde Standard; hence, OMB's decision led to more hazard warnings, not fewer.

OMB's disapproval was not based on the number of warnings, but, rather, on the substantial confusion voiced by the public over the specific language of the formaldehyde standard, which was not clear about when and where warnings were to be given. We note that, when OMB later approved the Formaldehyde Standard provisions, OSHA decided to stay these requirements administratively "in response to numerous public comments which indicated confusion about the hazard warning provisions...." (54 FR 35639). OSHA requested comments on alternatives that "would be less confusing to the public." Meanwhile, the Hazard Communication Standard remains in effect for formaldehyde.

14. FERTILITY SUPPLEMENT TO THE CURRENT POPULATION SURVEY (Special Report)

OMB Watch stated: "OIRA reduced this annual supplement that matches women's fertility patterns with important socioeconomic and demographic data to a biennial supplement because 'the changes from year to to year are not statistically significant.' Bureau officials and other outside the agency disagreed (especially as Congress has begun considering child-care legislation). Delays in OIRA's review of an appeal forced the Bureau to withdraw it, guaranteeing that the survey will be biennial, at least temporarily, because of procedural problems."

Response. The Current Population Survey is an important economic survey that collects primarily labor force data to produce monthly employment and unemployment figures. To ensure that respondent cooperation and data quality are maintained in this survey, OMB weighs the potential impact of all CPS Supplements on the primary data collection. The data from the Fertility Supplement did not show statistically significant changes from year to year. In addition, other Federal surveys collected similar fertility data. For these reasons, we did not believe that collecting these data annually could be justified.

Table II.1: Background Statistics on OIRA Employees as of June 1989

WORK EXPERIENCE:	Number of employees with experience in		
Years of experience	OMB	Other govt.	Private sector
No experience	0	10	20
Less than one year	3	2	4
1 to 3 years	12	7	10
More than 3 years	25	21	6
Average years	5.98	5.19	1.88
Range (in yrs)	0.2–17	0–24	0–26

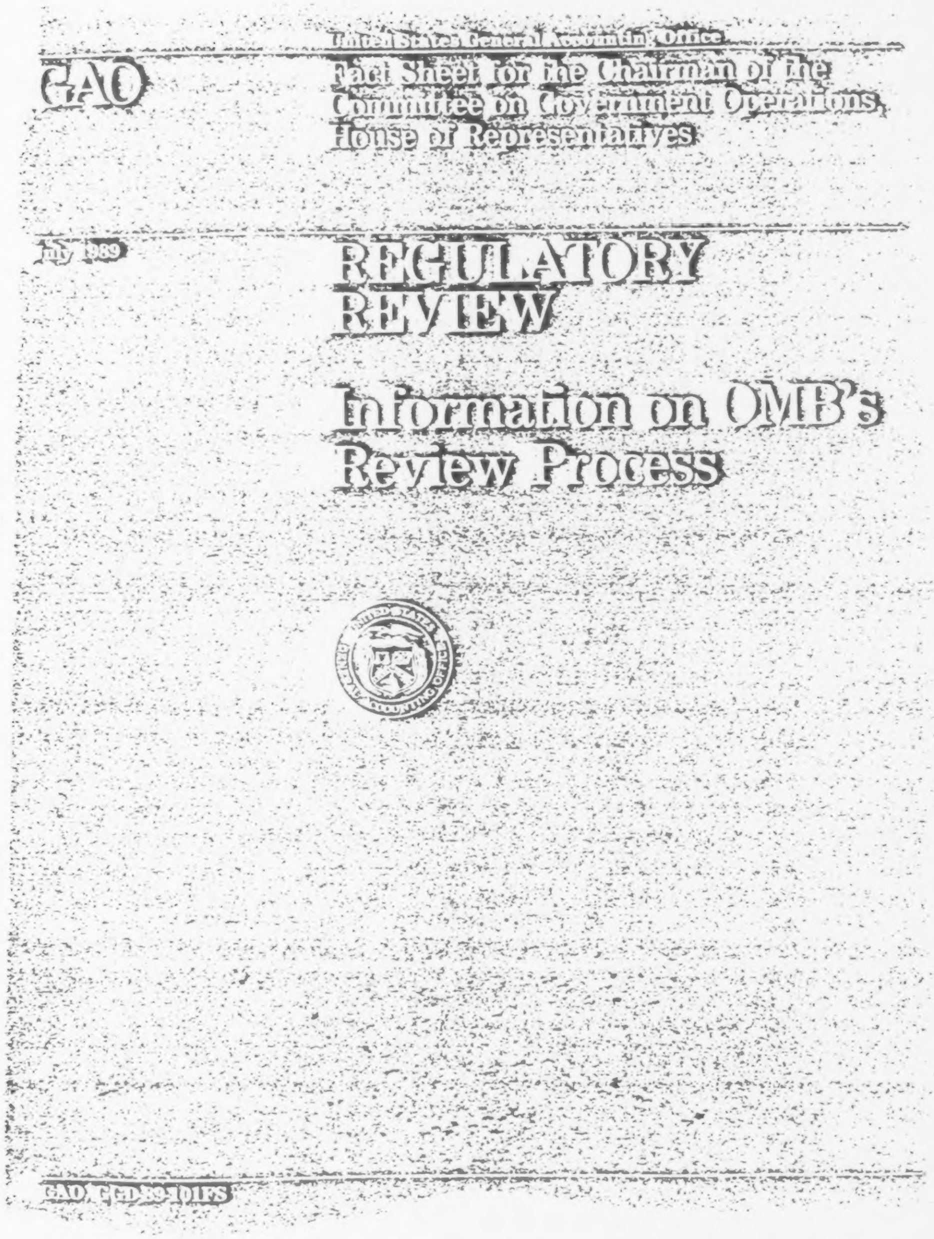
GRADE STRUCTURE:	
Grade	No. of employees
GS 9–11	5
GS 12	6
GS 13	6
GS 14	5
GS 15	12
SES and above	6

TYPE OF DEGREE:	
(highest degree)	No. of employees
Bachelor	5
Master	20
Law (JD, LLM, LLB)	5
Doctorate	10

FIELD OF STUDY	
Type of major	No. of employees
Public Policy/ Admin.	15
Economics/Finance	8
Law	5
Science/Math	5
Other	7

UNIVERSITIES GRADUATED FROM: (highest degree)	
University	No. of employees
Harvard Univ.	7
Univ. of Chicago	3
Princeton Univ.	2
Univ. of Pennsylvania	2
Univ. of Maryland	3
Univ. of Washington	2
George Washington Univ.	2
Univ. of California at Berkeley	2
Columbia Univ.	2
Univ. of Wisconsin	2
Other	13

Note: All tables have a total of 40 staff. The 16 clerical/support staff were not included.



United States General Accounting Office

GAO

Fact Sheet for the Chairman of the
Committee on Government Operations,
House of Representatives

July 1989

REGULATORY REVIEW

Information on OMB's Review Process

GAO/GGD-89-101FS

federal register

Thursday
March 31, 1983

Part IV

Office of Management and Budget

Controlling Paperwork Burdens on the Public standard. "only after the agency has opened a case file or its equivalent with respect to a particular party." This will ensure that generalized investigations not targeted to particular persons or companies do not fall within the exception.

Several public comments strongly endorse this section's provisions, especially the clarification of statutory intent in the last sentence. It should be stressed that the exceptions to coverage outlined in this section must be strictly construed. this secton does not permit generalized investigations of classes or categories of persons without necessary Paperwork Reduction Act clearance of paperwork requirements.

4. *Section 1320.4 General Requirements.* Two major issues of concern to the public and the agencies relate to this section: OMB authority to review reporting and recordkeeping requirements in current regulations that were adopted after public notice and comment, and to require display of control numbers on such requirements. These issues will be addressed in turn, followed by other issues raised by the comments.

(a) *OMB authority to review reporting and recordkeeping requirements in current rules adopted after public notice and comment.*

Several agencies and members of the public have commented that OMB's authority to review collections of information does not extend to collection of information requirements contained in agency regulations, and that provisions of this rule implementing OMB authority over such requirements is inconsistant with a memorandum by the Office of Legal Counsel of the Department of Justice (OLC), dated June 22, 1982. These comments are based on a misunderstanding of the Act and of the OLC memorandum.

The language and intent of the Paperwork Reduction Act compel the conclusion that OMB has the authority to review, and in appropriate circumstances to disapprove, paperwork requirements contained in agency regulations. Section 3504(h) of the Act clearly and unambiguously recognizes OMB authority to review, approve, and disapprove collection of information requirements in proposed rules. The argument that paperwork burdens are somehow outside the purview of the Act merely because they are imposed by means of agency rule is thus refuted by the Act itself.

It is not possible to argue that OMB clearance authority is confined to forms and similar instruments. The key terms defining jurisdiction of the Act—"collection of information" and "information collection request"—are both defined expressly to include "reporting and recordkeeping requirements" in addition to "written report forms" and "application forms." 44 U.S.C. § 3502(4), (11). Many reporting requirements are enforced by means of forms, but other reporting requirements and virtually all recordkeeping requirements are imposed by other means, including oral surveys, guidelines, directives, and—most significantly—regulations. Moreover, many forms are themselves specifically contained in regulations, either as part of the regulatory text or as an appendix. The only way all reporting and recordkeeping requirements can be covered by the Act is to cover these other methods for the collection of information, including regulations. An exemption for regulations would result in a large and unwarranted loophole in the Act—a loophole including all forms published in regulations, virtually all recordkeeping requirements, and most reporting requirements not involving a format set by the agency. Such a result would fly in the face of the announced congressional intention to eliminate virtually all exemptions from coverage in the old Federal Reports Act. S. Rep. No. 96–930, at 13. (Indeed, since reporting and recordkeeping requirements were reviewed by OMB and GAO under the Federal Reports Act, the contrary interpretation would actually create new exemptions from coverage and thus weaken—not strengthen—the Federal Reports Act.)

A distinction between reporting requirements in rules and those in forms—with only the latter covered—would also breed confusion, especially for the public. Many forms are published in the Code of Federal Regulations as part of a rule; others are cross-referenced in rules; others closely follow regulatory specifications. If reporting requirements in rules were exempt from OMB review and assignment of control numbers, then many forms would also be exempt—a result that would make it impossible for the public to have confidence in the public protection features of the Act. Moreover, since only rules adopted after notice and comment procedures would be exempt—since other rules are not "collection of information requirements" within the scope of Section 3504(h)—the public could not tell which rules were covered by the Act and which were not. OMB does not believe that Congress could have intended such a result.

That OMB has authority to review reporting and recordkeeping requirements in current rules adopted after public notice and comment is also evident from the history of the Kennedy Amendment to the Act. Prior to the Kennedy Amendment, the Act—which had already passed the House of Representatives—made no distinction whatever between paperwork burdens in forms and paperwork burdens in regulations. All were covered. Senator Kennedy and others, however, were concerned that OMB's authority over paperwork requirements in regulations could disrupt public participation rights under the informal rulemaking provisions of the Administrative Procedure Act. He explained:

> This legislation would permit the Director of OMB to overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency that promulgated the rule. Thus, even if an agency has complied with all the appropriate procedural requirements for public notice and comment, and has spent years compiling an adequate agency record, this legislation would permit OMB to overturn that agency decision without even requiring OMB to justify its decision publicly. *Daily Congressional Record* S14689 (November 19, 1980).

Senator Kennedy's proposed accomodation of the Paperwork Reduction Act to the Administrative Procedure Act was to require OMB to participate in the rulemaking by filing public comments. Unless OMB filed such comments (and in the absence of certain other circumstances) it would not be permitted to disapprove the new paperwork requirement. If OMB did participate in the process, however, its ultimate authority to approve or disapprove the new paperwork requirement under the statutory standards would be unimpaired. As observed by Senator Danforth (the only other Senator commenting on the Kennedy Amendment):

> I am willing to accept the Kennedy amendment, which is intended to clarify the authority of the Director of the OMB to review Federal rules and regulations to determine their impact on Federal paperwork. Essentially, as I understand it, the purpose of the Kennedy amendment is to prevent OMB from undoing a collection of information requirement specifically contained in an agency rule after that requirement has gone through the administrative rulemaking process if the OMB Director ignored the rulemaking process. This seems fair enough. *Daily Congressional Record* S14689–90 (November 19, 1980).

The Kennedy Amendment was passed by the Senate, and is now found in Section 3504(h) of the Act. Neither the language of the Amendment nor any comment by a Member of Congress suggested that the Amendment was intended to affect OMB authority over any reporting or recordkeeping requirements other than those in *proposed* rules undergoing notice and comment rulemaking.

It should be clear from this history that OMB has full authority over paperwork requirements in regulations, limited only by Section 3504(h). Section 3504(h) itself, moreover, is solely a procedural limitation on OMB authority and does not diminish OMB's substantive review powers. Certainly, Section 3504(h) does not altogether exempt any class of collection of information from OMB review. It follows that OMB has authority over reporting and recordkeeping requirements in rules that were in effect when the Act was passed as well as in rules subsequently issued with or without public notice and comment. The purpose of § 1320.14 of this rule is to provide procedural protections for collections of information in current regulations, to ensure the public's right to participate in informal rulemaking proceedings. This resolution is fully in keeping with the spirit and intent of the Kennedy Amendment.

Nor can it be argued that this result is inconsistent with interpretations of the Act by the OLC. Because of the difficulties of the issue, OMB and the Department of the Treasury consulted the OLC on the Act's application to reporting and recordkeeping requirements in current rules. In a memorandum dated June 22, 1982, OLC concluded that the information collection request approval procedures of Sections 3504(c)(1) and 3507 do not apply to such requirements. OLC also affirmed that OMB had been given "broad powers by the Act to initiate and review proposals for changes in existing regulations and to coordinate and improve agency information practices, whether contained in regulations or elsewhere." OLC provided further clarification of its views in a supplementary memorandum dated September 24, 1982, in which OLC commented on OMB interpretations and procedures. OLC concluded that "OMB does have authority to review and initiate proposals for change in existing regulations under Section 3504(b)(2) and, in accordance with the standards and limitations established by Sections 3504(h) and 3518(e), to disapprove collection of information requirements and proposed replacements for existing regulations."

Several commenters have argued that OMB review of reporting and recordkeeping requirements in regulations would amount to "regulatory reform" rather than paperwork reduction. As they point out, the legislative history is clear that Congress did not intend the Paperwork Reduction Act to be a "regulatory reform" bill. See H.R. Rep. No. 96–835, at 9; S. Rep. No. 96–930, at 8–9.

However, these comments misconstrue Congress' point. Congress did not mean that paperwork requirements should not be covered merely because they might be contained in regulations; it meant that OMB authority over paperwork should not be expanded to cover non-paperwork matters, *i.e.*, substantive regulatory issues. This is clear from the statute itself, which explicitly grants OMB authority to disapprove a "collection of information requirement *contained in an agency rule*." 44 U.S.C. 3504(h) (emphasis added). The Statute also expressly states that "the authority of an agency under any other law to prescribe * * * regulations * * * for Federal information activities is subject to the authority conferred on the Director by this chapter." 44 U.S.C. 3518(a).

This is also clear from the legislative history. The Senate Report, for example, states:

> The Committee intends that the Director of OMB continue efforts to oversee the information management and burden aspects *of government regulations*. This emphasis has great promise for minimizing the explosion of paperwork demands on the public because new regulations are causing the greatest growth in information requirement. *However, the Committee does not intend that "regulatory reform" issues which go beyond the scope of information management and burden be assigned to the Office.* S. Rep. No. 96–930, at 8–9 (emphasis added).

The limitations on OMB's "regulatory reform" power under the Act are implemented not by exempting reporting and recordkeeping requirements in regulations from coverage, but by an explicit substantive restriction on OMB's authority in Section 3518(e) (corresponding to § 1320.20(e) of this rule). As stated in the Senate Report,

> Section 3518(e) . . . results from concern that the authority of this Act might be used to increase the power of OMB over substantive policy . . . . This bill has provisions to guard against that. Section 3518(e) provides that the bill does not affect in any way the powers of the President or OMB respecting the substance of agency policies. Thus S. 1411 draws an important distinction between paperwork management and substantive decisions. S. Rep. No. 96–930, at 56.

It is therefore incorrect to argue that Congress' intention that the Act not be a "regulatory reform" statute means that OMB should have no authority to review reporting and recordkeeping requirements in current rules. Such an interpretation would strip OMB of a major portion of its delegated functions, while adding nothing to Section 3518(e)'s tailored limitations on OMB power over substantive agency policy.

The most difficult issue of statutory construction under the Act is the correct procedural mode for review of reporting and recordkeeping requirements in regulations adopted after public notice and comment. The resolution of that issue is discussed under § 1320.11.

(b) *Control Numbers*. One of the major subjects of comment on paragraph (a) of this section, and on related provisions elsewhere in the rule, is the requirement for display of OMB control numbers on collection of information requirements contained in agency rules adopted after public notice and comment. Most public comments addressing the issue have strongly supported the control number requirement. As frequently pointed out, the control number provides a simple and effective way for the public to tell whether a paperwork burden an agency seeks to impose has been cleared as the Act requires.

Several commenters have opposed applying control numbers to collection of information requirements contained in rules adopted after public notice and comment. These comments do not seem to be based on policy considerations, since they offer no practical or programmatic reasons why OMB should depart from the longstanding requirement of control numbers on such collections. Rather, the comments have argued that OMB lacks the legal authority to require control numbers on such collections.

The main line of argument taken by these comments is that the statutory control number requirement of Section 3507(f) applies specifically to "information collection requests." This argument is beside the point. As noted in the Supplementary Information to the Notice of Proposed Rulemaking, OMB acknowledges that the statutory control number requirement, on its face, applies to information collection requests, and that Section 3504(h)—the section of the Act addressing the clearance of collection of information requirements in proposed rules—does not address the question of control numbers, either to require them or to forbid them. The application of control numbers to collection of information requirements is, however, fully consistent with statutory purposes, and within OMB's regulatory authority under the Act.

The Paperwork Reduction Act vests the Director of OMB with the authority to "develop and implement Federal information policies, principles, standards, and guidelines and [to] provide direction and oversee the review and approval of information collection requests. * * * [and] the reduction of the paperwork burden." 44 U.S.C. 3504(a). That authority must be "exercised consistent with applicable law." *Ibid.* The Director's information policy functions also include "developing and implementing uniform and consistent information resources management policies and overseeing the development of information management principles, standards, and guidelines and promoting their use." 44 U.S.C. 3504(b)(1); "initiating and reviewing proposals for changes in * * * agency procedures to improve information practices." 44 U.S.C. 3504(b)(2); and "evaluating agency information management practices to determine their adequacy and efficiency, and to determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director." 44 U.S.C. 3504(b)(5). Finally, the Director is granted broad regulatory authority by Section 3516: "The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." The control number requirement for collection of information requirements has been made pursuant to these authorities, and not because it is directly mandated by the Act.

The agencies' obligation to comply with the Director's decisions under these authorities is expressly set out. Section 3518(a) states: "Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this Chapter." Moreover, Section 3506(a) provides that "[e]ach agency shall be responsible for * * * complying with the information policies, principles, standards, and guidelines prescribed by the Director."

Pursuant to these authorities, the Director has concluded that all collections of information, including those mandated by regulations, must display a currently valid OMB control number. Among the reasons for the Director's decision are the following:

First, application of the control number requirement to all Federal collections of information is consistent with the congressional intent:

> The Director's responsibility to ensure *all collections of information* display a control number corresponds to the requirement of Section 3507(f), which states an agency shall not engage in a *collection of information* without obtaining a control number from the Director. S. Rep. No. 96–930, at 42 (emphasis added).

Prior to adoption of the Kennedy Amendment (now Section 3504(b)), the Act did not distinguish between "information collection requests" and "collection of information requirements." All were covered; all were subject to the control number requirement. This requirement was for the benefit of the public, as well as for the improved management of the paperwork process. The control number would show "that the Director of OMB is the accountable individual in the government to be sure that the information is needed, is not duplicative of information already collected, and is collected efficiently." S. Rep. No. 96–930, at 9. The Kennedy Amendment was not intended to disturb this.

The purpose of the Amendment, as clearly stated by its proponent and the only other speaker on the floor, was to ensure procedural fairness in public notice and comment rulemaking procedures by denying OMB the authority to disapprove a requirement without having first participated in the rulemaking by filing comments. See 120 Cong. Rec. S14689–90 (1980). Congress expressly preserved OMB's ultimate authority to disapprove a collection of information requirement in a rule. There is no basis for concluding that Congress intended to make such disapproval any less legally enforceable than it was before the Kennedy Amendment was adopted. Nor is there any basis for concluding that Congress intended to take away the public's means of telling whether or not a collection of information had undergone the clearance process and been approved by OMB. The decision of the Director to require control numbers on collection of information requirements contained in rules adopted after public notice and comment thus promotes the purposes of the Act.

Second, experience has shown that assignment of control numbers to reporting and recordkeeping requirements contained in regulations is workable, useful, and easily administered. Dozens of agencies, including the Commodities Futures Trading Commission, the Department of Agriculture, the Department of the Treasury (Bureau of Alcohol, Tobacco, and Firearms), the Environmental Protection Agency, the Nuclear Regulatory Commission, the Securities and Exchange Commission, the Federal Communications Commission, the Equal Employment Opportunity Commission, the Pension Benefit Guaranty Corporation, the Department of Labor, the Department of Health and Human Services, the Federal Maritime Commission, the National Credit Union Administration, and the Department of the Interior, have routinely submitted reporting and recordkeeping requirements in regulations to OMB for review and assignment of control numbers. The assignment of control number to paperwork requirements in regulations by OMB and GAO was the practice under the Federal Reports Act. This practice was presumably known to Congress when it enacted the Paperwork Reduction Act, and there is no evidence that it intended the practice to be changed. OMB believes that altering this established and smoothly-functioning administrative practice would be disruptive.

Third, the control number is an important mechanism for inventorying the paperwork burden, monitoring agency efforts to reduce the burden, coordinating the clearance process with the Information Collection Budget, and keeping track of individual requirements for purposes of periodic review. The Act requires extensive monitoring and inventorying of paperwork requirements. Control numbers are a convenient mechanism for carrying out these statutory responsibilities.

Fourth, the presence of control numbers will alert the public that the Act applies to paperwork requirements in regulations, and will make OMB accountable to the public for reducing burden. As the Senate Report notes, control numbers enable the public to play a "policing role in monitoring agency compliance with the legislation." S. Rep. No. 96–930, at 17. Public comment and participation is a key means of identifying ways to reduce unnecessary paperwork burdens.

Fifth, adherence by the agencies to the control number requirement will eliminate the risk that courts will find reporting and recordkeeping requirements not bearing control numbers unenforceable under Section 3512 of the Act. Although the Office of Legal Counsel memorandum of June 22, 1982 concluded, in effect, that OMB control numbers are not explicity required by the Act itself, that opinion is not binding on the courts. Agency compliance with the requirement will reduce the risk of judicial disruption of regulatory schemes that depend on collection of information by means of regulation.

Finally, display of control numbers on collection of information requirements contained in agency rules is vital to ensuring the integrity of the control number mechanism for information collection requests. Many collections of information contained in rules are in fact "forms" published in the Code of Federal Regulations either as part of the regulatory text or as appendices. When distributed to the public, these forms appear identical to information collection requests not contained in regulations. If the forms do not display a control number, the public will be confused: they may erroneously conclude that a form has not received OMB clearance under the Act and thus may be disregarded with impunity, or they may become persuaded that the lack of a control number is legally meaningless. A similar potential for confusion exists for collections of information mandated by regulation but not implemented by forms. Some such collections—those promulgated pursuant to notice and comment procedures—are "collection of information requirements." The remainder are "information collection requests." Yet the public cannot tell from the face of the Code of Federal Regulations which are which.

The purpose of the Paperwork Reduction Act and of this rule is to protect the public. It would be entirely contrary to the spirit and intent of the Act to make its fundamental public notification mechanisms depend upon legalistic distinctions between "information collection requests" and "collection of information requirements"—distinctions that are in no way discernible on the face of the form or the regulation. The Director's decision to require control numbers for all collections of information eliminates this source of confusion, and thus implements the Congressional intent.

To the extent that opposing comments have relied on a memorandum by the OLC, their reliance is misplaced. As explained in the preamble to the Notice of Proposed Rulemaking, the OLC's June 22, 1982 memorandum did not address the issue of OMB's authority to require control numbers on collection of information requirements in agency rules. Moreover, OLC's September 24, 1982 memorandum stated:

> OMB may require agencies to display control numbers on regulations containing collection of information requirements that have been approved. Such numbers shall function as management devices for purposes of internal OMB processing and inventory, and as a simple means of communicating to the public the fact that a requirement has been reviewed and approved by OMB.

(c) Other issues. Other issues have also been raised concerning paragraph (a) of § 1320.4. Several agencies and members of the public have pointed out that paragraph (a), as printed in the proposed rule, mistakenly eliminated the requirement that voluntary collections of information display control numbers. This conflicted with other sections of the proposed rule, and with the Act itself. The words "if the collection of information is non-voluntary" have been deleted to correct this error.

Several members of the public have requested clarification of how long an approved collection of information may be conducted. The proposed rule has therefore been modified by adding a new sentence: "An agency shall not continue to engage in such collection of information after the expiration date of the control number, unless OMB has approved an extension." This means that the agency must complete the collection of information within the approved time period, and may not engage in the collection or any part of it after the period expires. An agency may, of course, obtain an extension of the period upon a proper showing under the statutory standards.

There has been some confusion over the requirement that collections of information not covered by the Act contain a statement notifying potential respondents of that fact. Several agencies have suggested that this requirement not be imposed; however, the requirement is statutory and cannot be eliminated by regulation. The last sentence of paragraph (a) of this section has been reworded for the sake of clarity. It now reads: "Each agency shall ensure that collections of information required by law or necessary to obtain a benefit and which are submitted to nine or fewer persons shall state that the collection of information is not subject to OMB review under the Act." This notification requirement is not intended to apply to matters which are not collections of information as defined by § 1320.7 of this rule, nor to matters which are exempted from coverage of the Act as a whole under § 1320.3 of this rule. For example, the notification requirement does not apply if the collection of information is directed to federal employees in the course of their employment or if it calls for particularized facts or opinions specifically tailored to a single person. See §§ 1320.7(p), 1320.7(k)(6).

Several members of the public suggested adding the words "for the proper performance of the agency's functions" after the word "necessary" in paragraph (b)(1) of this section. Since the suggested language is part of the terminology of the Act, the comments were adopted.

A new paragraph (c) has been added. This locates all substantive standards for submissions and review of collections of information under the Act in a single place in this rule. The new paragraph (c) sets forth the principles governing OMB review. Most of this material was located in § 1320.11(b) of the proposed rule. The standards are derived from the statutory terms and the legislative history. Subparagraph (1) makes clear that OMB will consider necessary any collection of information specifically mandated by statute or court order. This should be understood to extend to other legal requirements with the force of a statute or court order, such as treaties, executive orders, and international agreements.

A new subparagraph (2) has been added at the request of several agencies to clarify the relationship between OMB approval of the information collection components of a regulation, and subsequent information collection requests implementing such regulation. The new subparagraph provides that OMB will consider necessary any information collection requests specifically required by an agency rule adopted after public notice and comment and approved or not acted upon by OMB pursuant to § 1320.13, but will independently assess any such information collection request to the extent that it deviates from the specifications of the rule.

Paragraph (d), which was lettered as (c) in the proposed rule, has been modified to add the words "for any reason" to conform to the language of Section 3508 of the Act, which provides: "To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, *for any reason*, the agency may not engage in the collection of the information" (emphasis added).

One agency has objected to § 1320.4(b)(3)'s requirement that OMB ensure that collections of information by federal agencies have "practical utility." The agency argued that the Paperwork Reduction Act "was never intended to provide OMB such wide discretion in controlling the internal information needs of an agency." This comment is based upon a misunderstanding of the Act. Section 3508 of the Act provides: "Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary to the proper performance of the functions of the agency, including whether the information will have

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OMB NUMBER: 1032-0038 DATE REC'D: 02/09/88  REQ CLASS: EXT(ADJ)
AGENCY FORM NO(S): 6-1221-A & ET AL & (39 FORMS)
TITLE: INDUSTRIAL MINERALS SURVEYS
ON PLAN: YES                EXCEED BUDGET: NO          ALLOWANCE LETTER: NO
FUNCTION: 306               3504(H): N/A               NO. OF FORMS: 39
AFFECTED PUBLIC: STATE/LCL GOV & BUS/INST
USE: PUBLIC  SMALL BUS: YES      SIC: MUL & 106 & 132 & 141 & 147 & 149 & 281
                                         & 324 & 327 & 329
PURPOSE: STATIS
FREQUENCY: MTLY & QTLY & SEMIA & ANNL & BIEN
COLLECTION METHOD: MAIL S/A
RETENTION PERIOD:           PUBLIC COST:
COMPULSORY STATUS: VOLUNTARY
COL AGENT: RQSTG AGCY       CONFIDENTIALITY: YES       FCOST: $276,000
RESPONDENTS: 10,211         RESPONSES: 16,648          HOURS: 11,172
REVIEWER: PAMELA BARR                                  EXPIRE DATE: 04/13/88
ACTION: DISAPPROVED                                    ACTION DATE: 04/13/88
PUBLICATION DATE:                                      EFFECT DATE:
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'EXTRACTIVE INDUSTRY, MINING, INDUSTRIAL MINERALS'. THE SURVEY ENABLES THE SECRETARY OF THE INTERIOR TO MEET THE RESPONSIBILITIES MANDATED BY THE NATIONAL MATERIALS AND MINERALS POLICY, RESEARCH AND DEVELOPMENT ACT OF 1980 (P.L. 96-479) AND TO INFORM THE CONGRESS OF DEVELOPMENTS IN THE MINERALS INDUSTRIES INCLUDING POTENTIAL CRISES THEREIN. THE INFORMATION IS PUBLISHED IN SEVERAL BUREAU OF MINES PUBLICATIONS FOR USE BY PRIVATE ORGANIZATIONS AND OTHER GOVERNMENT AGENCIES. THE

REMARKS:

This information collection is disapproved because of the monthly data collections that do not have adequate justification, pursuant to 5 CFR 1320.6. Stating that industry maintains the information in a monthly format is not adequate justification, as the firm can easily aggregate the monthly data to quarterly.

When BOM resubmits this clearance package, they should address the following questions:

- -Why is it necessary to collect data on Portland and Masonry Cement, Lime, Sulfur, and Marketable Phosphate Rock on a monthly basis?
- -Have any of the minerals from these 39 forms been declared strategic by FEMA? If so, which ones and why?
- -Why does BOM do separate annual surveys of many of these minerals, rather than aggregating the monthly or quarterly data they now receive?
- -Who uses this data and for what? Do any industry associations or private groups collect similar information?

OMB NUMBER: 1115-0130 DATE REC'D: 04/26/88 REQ CLASS: EXT(ADJ)
AGENCY FORM NO(S): I-697
TITLE: CHANGE OF ADDRESS NOTICE
ON PLAN: NO EXCEED BUDGET: NO ALLOWANCE LETTER: NO
FUNCTION: 999 3504(H): N/A NO. OF FORMS: 1
AFFECTED PUBLIC: IND/HHLD
USE: PUBLIC SMALL BUS: NO SIC:
PURPOSE: PLAN MGMT
FREQUENCY: OCCAS.
COLLECTION METHOD: MAIL S/A
RETENTION PERIOD: PUBLIC COST:
COMPULSORY STATUS: VOLUNTARY
COL AGENT: RQSTG AGCY CONFIDENTIALITY: NO FCOST: $0
RESPONDENTS: 2,877,708 RESPONSES: 2,877,708 HOURS: 238,849
REVIEWER: ROBERT FISHMAN EXPIRE DATE: 07/24/88
ACTION: DISAPPROVED ACTION DATE: 07/24/88
PUBLICATION DATE: EFFECT DATE:

'IMMIGRATION, NATURALIZATION, LEGALIZATION, ALIEN, ADDRESS'..
IN COMPLIANCE WITH P.L. 99-603, THE SERVICE WILL USE THIS FORM TO KEEP CURRENT THE ADDRESSES OF LEGALIZATION AND SPECIAL AGRICULTURAL WORKERS.

REMARKS:
This collection is disapproved under 5CFR1320. INS needs to reassess the need for each data element, especially country and date of birth. INS should consider making the change of address card optional, and eliminating all data except name, A-file no., and present address.

```
OMB NUMBER: 1512-0036 DATE REC'D: 08/30/88  REQ CLASS: EXT
AGENCY FORM NO(S): ATF F & 5020.20
TITLE: FORM LETTER - PERSONNEL INQUIRY RE: APPLICANT FOR FEDERAL
       PERMIT \
       ATF F 5020.20
ON PLAN: NO               EXCEED BUDGET: NO           ALLOWANCE LETTER: NO
FUNCTION: 751             3504(H): N/A                NO. OF FORMS: 1
AFFECTED PUBLIC: IND/HHLD
USE: PUBLIC  SMALL BUS: NO       SIC:
PURPOSE: APPLICATION
FREQUENCY: OCCAS
COLLECTION METHOD: MAIL S/A & OTHR S/A & TEL IN & PERS IN
RETENTION PERIOD:         PUBLIC COST:
COMPULSORY STATUS: VOLUNTARY
COL AGENT: RQSTG AGCY     CONFIDENTIALITY: NO         FCOST: $900
RESPONDENTS: 1,500        RESPONSES: 1,500            HOURS: 1,500
REVIEWER: MILO B  SUNDERHAUF                          EXPIRE DATE: 11/15/88
ACTION: DISAPPROVED                                   ACTION DATE: 11/15/88
PUBLICATION DATE:                                     EFFECT DATE:
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'LICENSES, PERSONAL EVALUATIONS'
ATF F 5020.20 VERIFIES REFERENCES GIVEN BY A PERSON APPLYING FOR AN ATF PERMIT OF LICENSE, APPLICANT-INTEGRITY, BUSINESS RESPONSIBILITY AND GENERAL REPUTATION FOR CONFORMITY WITH LAWS AND REGULATIONS AND LENGTH OF ASSOCIATION RESPONDENT HAS KNOWN APPLICANT.

REMARKS:
Disapproved. In response to our objection to the intrusive nature of this vague inquiry, BATF determined from a survey of field offices that this collection is not being used. Therefore BATF does not plan to propose an alternative and we are removing the collection from the inventory.

```
OMB NUMBER: 2030-0021 DATE REC'D: 01/11/89  REQ CLASS: REINSTATE
AGENCY FORM NO(S): 1245
TITLE: UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY
       ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS
ON PLAN: NO                EXCEED BUDGET: NO          ALLOWANCE LETTER: NO
FUNCTION: 999              3504(H): N/A               NO. OF FORMS: 1
AFFECTED PUBLIC: IND/HHLD & STATE/LCL GOV & FARMS & BUS/INST & NON-PROFIT INST

USE: PUBLIC  SMALL BUS: YES      SIC: 999
PURPOSE: REG/COMP
FREQUENCY: OTHER
COLLECTION METHOD: MAIL S/A
RETENTION PERIOD:          PUBLIC COST:
COMPULSORY STATUS: MANDATORY
COL AGENT: RCDKPG RQT      CONFIDENTIALITY: NO        FCOST: $0
RESPONDENTS: 200           RESPONSES: 200             HOURS: 400
REVIEWER: SUSAN DUDLEY                                EXPIRE DATE: 10/31/88
ACTION: DISAPPROVED                                   ACTION DATE: 03/10/89
PUBLICATION DATE:                                     EFFECT DATE:
```

'COLLECT INFORMATION, REPLACEMENT HOUSING, REPLACEMENT BUSINESS LOCATIONS, REAL PROPERTY, ACQUISTION'
STATE AND LOCAL GOVERNMENT RECEIVING EPA ASSITANCE WILL COLLECT INFORMATION CONCERNING NEEDS FOR REPLACEMENT HOUSING AND REPLACEMENT BUSINESS LOCATIONS FROM PERSONS WHOSE REAL PROPERTY IS BEING ACQUIRED OR WHO ARE BEING RELOCATED. INFORMATION WILL BE COLLECTED AS ACQUISITION AND RELOCATION PROGRESSES TO ENSURE COMPLIANCE WITH

REMARKS:
This information collection request is disapproved. EPA has completely ignored the terms of the previous approval as outlined in the OMB Notice of Action dated 5/22/86. These terms require EPA to justify the recordkeeping burden and supply copies of basic background documents including the regulation which imposes the information collection. This request should be resubmitted as soon as possible.

```
OMB NUMBER: 0701-0102 DATE REC'D: 11/07/88  REQ CLASS: REINSTATE
AGENCY FORM NO(S):
TITLE: WAGE RATES AND FRINGE BENEFITS
ON PLAN: NO                EXCEED BUDGET: NO          ALLOWANCE LETTER: NO
FUNCTION: 939              3504(H): N/A               NO. OF FORMS: 1
AFFECTED PUBLIC: STATE/LCL GOV & BUS/INST & NON-PROFIT INST
USE: PUBLIC  SMALL BUS: YES      SIC: 999
PURPOSE: PLAN MGMT
FREQUENCY: OCCAS
COLLECTION METHOD: MAIL S/A
RETENTION PERIOD:          PUBLIC COST:
COMPULSORY STATUS: VOLUNTARY
COL AGENT: RQSTG AGCY      CONFIDENTIALITY: NO        FCOST: $0
RESPONDENTS: 150           RESPONSES: 150             HOURS: 150
REVIEWER: J. TIMOTHY SPREHE                           EXPIRE DATE: 08/31/88
ACTION: DISAPPROVED                                   ACTION DATE: 02/16/89
PUBLICATION DATE:                                     EFFECT DATE:
```

'WAGE SURVEYS, CONTRACTOR PERSONNEL, DEPARTMENT OF DEFENSE CONTRACTORS'. SECTION 4(C) OF THE SERVICE CONTRACT ACT PROVIDES THAT WHERE NEGOTIATED WAGES AMD FRINGES APPEAR TO BE SUBSTANTIALLY AT VARIANCE WITH WITH THOSE THAT PREVAIL IN THE LOCALITY OF PERFORMANCE, THE AFFECTED PARTY(S) MAY REQUEST A HEARING TO ESTABLISH PREVAILING RATES. IT IS NECESSARY TO CONDUCT A SURVEY OF SIMILAR OPERATIONS UTILIZATING THE JOB CLASSIFICATIONS IN QUESTION WITHIN THE LOCALITY FOR THIS PURPOSE.

REMARKS:
Disapproved. Findings and conclusions of administrative law judges in 1985 and 1988 indicate that Air Force does not in fact follow the statistical methods described in the information collection request. Until Air Force can certify that these methods will be followed impartially, this information collection has no practical utility.

```
OMB NUMBER: 1115-0064 DATE REC'D: 11/03/89  REQ CLASS: REINSTATE
AGENCY FORM NO(S): N-430
TITLE: REQUEST THAT APPLICANT FOR NATURALIZATION APPEAR FOR
       INTERVIEW
ON PLAN: YES                EXCEED BUDGET: NO          ALLOWANCE LETTER: NO
FUNCTION: 751               3504(H): N/A               NO. OF FORMS: 01
AFFECTED PUBLIC: IND/HHLD
USE: PUBLIC  SMALL BUS: NO        SIC:
PURPOSE: APPLICATION
FREQUENCY: OTHER
COLLECTION METHOD: MAIL S/A
RETENTION PERIOD:           PUBLIC COST:
COMPULSORY STATUS: REQD FOR BEN
COL AGENT: RQSTG AGCY       CONFIDENTIALITY: NO        FCOST: $209,000
RESPONDENTS: 311,625        RESPONSES: 311,625         HOURS: 25,864
REVIEWER: EDWARD H. CLARKE                             EXPIRE DATE: 07/31/89
ACTION: DISAPPROVED                                    ACTION DATE: 12/01/89
PUBLICATION DATE:                                      EFFECT DATE:
```

'ALIEN, NATURALIZATION APPLICANT, IMMIGRATION INTERVIEW'
THE INFORMATION REQUESTED ON THIS FORM IS NEEDED IN ORDER TO PREPARE THE CERTIFICATE OF NATURALIZATION FOR AN ELIGIBLE PETITIONER FOR NATURALIZATION AS PRECRIBED IN SECTION 338 OF THE I AND N ACT.

REMARKS:
Not approved. This information collection request remains unresponsive to the notices of action, dated 7/24/88 and 8/28/89, that required INS to complete a review of all naturalization requirements associated with the naturalization interview. This review must extend beyond the forms N-445 and N-430 to determine whether the burdens imposed upon applicants are proportionate to need. The 8/28/89 remarks also requested a review of burden estimates, with the view that the public reporting burden (including the time needed to gather and maintain the data needed) for the naturalization process far exceeds the time estimated for the N-430 (5 minutes) and any estimates provided in connection with other INS information collection instruments associated with the naturalization process.

```
OMB NUMBER: 2502-0364 DATE REC'D: 11/10/88  REQ CLASS: REINSTATE
AGENCY FORM NO(S): HUD-9040
TITLE: MONTHLY SURVEY OF PRIVATE MORTGAGE INSURANCE
       ACTIVITY
ON PLAN: YES              EXCEED BUDGET: NO         ALLOWANCE LETTER: NO
FUNCTION: 451             3504(H): N/A              NO. OF FORMS: 1
AFFECTED PUBLIC: BUS/INST
USE: PUBLIC  SMALL BUS: NO      SIC: 999
PURPOSE: STATIS
FREQUENCY: MTLY
COLLECTION METHOD: TEL IN
RETENTION PERIOD:         PUBLIC COST:
COMPULSORY STATUS: VOLUNTARY
COL AGENT: ROSTG AGCY     CONFIDENTIALITY: YES      FCOST: $0
RESPONDENTS: 13           RESPONSES: 156            HOURS: 13
REVIEWER: JOHN ALLISON                              EXPIRE DATE: 09/30/87
ACTION: DISAPPROVED                                 ACTION DATE: 11/19/88
PUBLICATION DATE:                                   EFFECT DATE:
```

'SURVEY, PRIVATE MORTGAGE INSURANCE, MARKET SHARE, TRENDS, STATISTICS'
THIS SURVEY ENABLES PRIVATE AND PUBLIC OFFICIALS TO TRACK THE GROWTH AND CONTRIBUTIOS OF PRIVATE MORTGAGE INSURANCE INDUSTRY AND PROVIDES AGGREGATE STATISTICS FOR MARKET SHARE ANALYSIS. DATA OBTAINE FROM PMIC'S ENSURES A SOUND ANALYSIS OF MORTGAGE MARKET TRENDS AND FUTURE OUTLOOK.

REMARKS:
OMB is disapproving this information collection request. The Department has not demonstrated, pursuant to the requirements at 5 CFR 1320.4, that a monthly collection of this information is necessary for the proper functioning of HUD's mortgage insurance programs. If the Department wishes to collect this information, it should indicate precisely how this information will be used by it, including the submission to OMB of previously-prepared reports and analyses using these data, and should request a collection periodicity that conforms with demonstrated, specific programmatic needs. Within ten working days of the receipt of OMB's "notice of action," the Department must indicate to OMB the actions taken to comply with this disapproval.

```
OMB NUMBER: 2502-0100 DATE REC'D: 02/02/88  REQ CLASS: EXT(ADJ)
AGENCY FORM NO(S): HUD-93115
TITLE: NOTICE OF JOB CHANGE AND CHANGES IN FAMILY COMPOSITION
ON PLAN: YES               EXCEED BUDGET: NO         ALLOWANCE LETTER: NO
FUNCTION: 371              3504(H): N/A              NO. OF FORMS: 01
AFFECTED PUBLIC: IND/HHLD
USE: PUBLIC  SMALL BUS: NO       SIC:
PURPOSE: REG/COMP
FREQUENCY: OCCAS
COLLECTION METHOD: MAIL S/A
RETENTION PERIOD:          PUBLIC COST: $2,400
COMPULSORY STATUS: REQD FOR BEN
COL AGENT: RQSTG AGCY      CONFIDENTIALITY: NO       FCOST: $5,382
RESPONDENTS: 175,000       RESPONSES: 175,000        HOURS: 17,500
REVIEWER: JOHN ALLISON                               EXPIRE DATE: 05/05/88
ACTION: DISAPPROVED                                  ACTION DATE: 05/05/88
PUBLICATION DATE:                                    EFFECT DATE:

'RECERTIFICATION OF INCOME, SUBSIDY ELIGIBILITY'
THIS FORM IS SUBMITTED BY MORTGAGORS TO NOTIFY THE MORTGAGEE OF JOB
CHANGES AND CHANGES IN ADULT FAMILY INCOME OR COMPOSITION. NEEDED TO
DETERMINE ELIGIBILITY FOR ASSISTANCE.




REMARKS:
This information collection is disapproved, because it is duplicative
of OMB clearance 2502-0082.  In accordance with the HUD and OMB
agreement, HUD will eliminate this collection
from its inventory.
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OMB NUMBER: 3316-0016 DATE REC'D: 11/17/87 REQ CLASS: EXT
AGENCY FORM NO(S): 9176
TITLE: FARMER QUESTIONNAIRE -- VICINITY OF NUCLEAR POWER PLANT
ON PLAN: NO EXCEED BUDGET: NO ALLOWANCE LETTER: NO
FUNCTION: 271 3504(H): N/A NO. OF FORMS: 01
AFFECTED PUBLIC: IND/HHLD & FARMS
USE: PUBLIC SMALL BUS: NO SIC: 999
PURPOSE: REG/COMP
FREQUENCY: SEMIA & ANNL
COLLECTION METHOD: TEL IN & PERS IN
RETENTION PERIOD: PUBLIC COST:
COMPULSORY STATUS: VOLUNTARY
COL AGENT: RQSIG AGCY CONFIDENTIALITY: YES FCOST: $50,000
RESPONDENTS: 1,200 RESPONSES: 1,200 HOURS: 1,200
REVIEWER: VARTKES BROUSSALIAN EXPIRE DATE: 02/08/88
ACTION: DISAPPROVED ACTION DATE: 02/08/88
PUBLICATION DATE: EFFECT DATE:

'ENVIRONMENTAL MONITORING, RADIATION MONITORING, AGRICULTURAL PRODUCTS' USED TO LOCATE RURAL RESIDENTS, HOME GARDENS, AND MILK ANIMALS FOR MONITORING PURPOSES AROUND NUCLEAR PLANTS.

REMARKS:
This collection appears to go much further than required by NRC. The monitoring program called for my the NRC license (copies of the relevant pages were attached to the supporting statement) merely refers to "a census of animals piroducing milk for human consumption ... (to be) conducted at the beginning and at the middle of the growing season." It also requires a land use census identifying milk animals, residences, and fresh leafy vegetation, at least once per 12 months. The supporting statement should fully justify the collection of any information not specifically required by NRC.

54 Federal Register 41704
41705

October 11, 1989

OFFICE OF MANAGEMENT AND BUDGET

Public Access to the Federal Information Locator System

AGENCY: Office of Management and Budget.

ACTION: Notice.

SUMMARY: The Office of Management and Budget (OMB) is announcing public access to the Federal Information Locator System (FILS). OMB is making available a document composed of an indexed summary of data on collections of information from the public for which individual Federal agencies have sought and received prior approval from OMB, as required by the Paperwork Reduction Act. FILS can serve as a guide for identifying sources of information within the Federal government on subject areas of interest to researchers or other users of information.

FOR FURTHER INFORMATION CONTACT: Joseph F. Lackey, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3002, New Executive Office Building, Washington, D.C. 20503. Telephone: (202) 395-7316.

SUPPLEMENTARY INFORMATION:

Background

The Paperwork Reduction Act requires the establishment and operation of FILS to serve as an authoritative register of all collections of information sponsored by Federal agencies (44 U.S.C. 3511). One of the purposes of FILS is to assist the public, as well as individual Federal agencies, in locating existing government sources of information. OMB Circular No. A-130, Management of Federal Information Resources requires that agencies provide adequate public notice when initiating significant information products. This notice is issued pursuant to that policy.

Construction of FILS

Under the Paperwork Reduction Act, agencies proposing to collect information from the public are required to obtain approval from OMB prior to conducting such an activity. In the case of ongoing information collections, such as applications for benefits, OMB approval is required at least once every three years. As part of the process of obtaining OMB approval, agencies submit information to OMB describing the nature of the data collection, the respondents to the collection, and the paperwork burden imposed on the public. Some of this information is stored in a computerized database designed for internal OMB use to keep track of agency requests and OMB approvals. FILS is generated from that database.

FILS contains the following information about each information collection in the database:

- An eight-digit OMB approval number;
- Title of the information collection;
- Name of sponsoring department/agency;
- Agency form number (e.g., IRS Form 1040);
- Affected public (i.e., individuals or households, State or local government, farms, businesses non-profit institutions);
- Purpose (i.e., application for benefits, program evaluation, general purpose statistics, regulatory or compliance, program planning or management, research, audit);
- Frequency (i.e., on occasion, weekly, monthly, annually, biennially, other);
- Number of respondents;
- Total hours of burden imposed on the public;
- Keywords; and
- Abstract describing the data collection.

Organization of FILS Data File Document

The FILS data file document is comprised of several sections. The first section is a textual introduction explaining the background of the data file and containing much of the information in this Notice. Following the introduction, the user will find the main body of the FILS data file--a sequential listing (by OMB approval number) of currently approved data collections. Next, the user will find an index of "keywords" in alphabetical order. The index is followed by a table of agency codes for each Federal agency. (These codes are used as the first four digits of the eight-digit OMB approval number assigned to each information collection.) The last section of the file contains the names, addresses and telephone numbers of Federal agency officials the public may contact for further details regarding particular information collections, including requests for copies of specific forms or reports of results.

Public Access

OMB is enabling public access to FILS in several ways:

(1) The Government Printing Office is distributing the FILS data file document through the Federal Depository Library program. Under this program microfiche of the document will be available for free public use in approximately 525 libraries located throughout the country.

(2) Copies of the FILS data file document may be purchased from the Department of Commerce's National Technical Information Service (NTIS). It may be purchased from NTIS in paper, microfiche or diskette format for: $91.50 in paper, $25.50 in microfiche, and $275.00 in IBM PS2 diskette format. The NTIS

document numbers for these formats are PB89-221808 for paper or microfiche and PB89-221816 for diskettes. The document may be ordered from NTIS by calling the NTIS sales desk at (703) 487-4650 or by writing to National Technical Information Service, Document Sales, 5285 Port Royal Road, Springfield, Virginia 22161.

(3) The FILS data file document may be used without charge by the public at the Office of Management and Budget in Washington, D.C. by calling the Office of Information and Regulatory Affairs Docket Library at (202) 395-6880.

Signed

S. Jay Plager
Administrator
Office of Information
and Regulatory Affairs

OMB WATCH

1731 Connecticut Avenue, Northwest
Washington, D.C. 20009-1146
Telephone: (202) 234-8494
Fax: (202) 234-8584

April 3, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

After your February 21, 1990, hearing on reauthorization of the Paperwork Reduction Act, Senator Bingaman submitted a set of questions to James MacRae, Acting Administrator of OIRA. Among the material Mr. MacRae submitted in response to those questions was "An Assessment of the OMB Watch Report: 'Playing the Numbers'." This was a critique of our October, 1989 report, which found a number of problems with OMB's implementation of the Paperwork Reduction Act.

This letter is a response to OMB's critique. We respectfully request that it be included in the record of the February 21st hearing.

In general, we must first note that we are pleased that OMB has read our report and has found so much to agree with. First, OMB acknowledges that it "has previously agreed with some of the implementation problems noted by OMB Watch" — although it has not publicly indicated on which points it concurs. Second, OMB accepts (or at least has decided not to challenge) almost all of the more than 25 criticisms and recommendations offered in our report. Some of the major points we made include:

- OIRA has used E.O. 12291 to target health and safety regulations;
- OIRA Desk Officers lack relevant training and experience;
- Administrative changes made in 1986 have done little to make regulatory reviews more publicly accessible and accountable;
- OIRA's use of short-term paperwork approvals needs much greater study;
- For several agencies, average review time for regulatory paperwork exceeds the legislatively mandated 60- day time limit;
- Delay remains an OIRA strategy to defeat regulations and paperwork not to its liking;
- OIRA's numbers are largely unreliable (below, we demonstrate how even OMB's rebuttal supports this point; and
- Public access to OIRA records is very limited thereby reducing public accountability.

OMB only takes issue with our claims that:

- OMB targets health and safety paperwork; and
- OMB has used its powers to subvert the intentions of the Administrative Procedure Act.

Additionally, OMB states that our "analysis is misleading" and that we have made "numerous errors of fact and presentation."

General Response to OMB's Rebuttal

We strongly disagree with OMB's criticisms of our October, 1989 report.

One of its criticisms of our report is:

> "Even if OMB Watch corrected its numbers, this type of analysis would offer little insight into the effect of the OMB decisions on the agencies or the merits of OMB decisions. Evaluating the impact of OMB decisions on agencies requires a detailed and systematic analysis of individual decisions, which OMB Watch did not do."

Yet OMB criticizes a recent General Accounting Office (GAO) report for just the opposite reason:

> "The concerns raised by the General Accounting Office (GAO) report appear to be based more on the subjective views of the 17 agency staff interviewed than on the statistical analyses of the 20,497 information requests that OMB processed between 1982 and 1987." [1]

OMB can't have it both ways. They can't criticize our report for not having a case-by-case analysis and then criticize GAO's for not having a statistical analysis. Furthermore, as we describe below, both studies included case-by-case *and* statistical analyses.

OMB fails to mention that OMB Watch has been reviewing individual OIRA decisions every month for the last five years, describing agency, OIRA, and public concerns about each decision. OMB also does not mention that OIRA staff have been largely uncooperative in providing information about each decision. For example, it is quite common for OIRA Desk Officers not to answer our questions, forcing us to rely on agency comments. To our knowledge, no one has provided a more comprehensive and detailed analysis of individual OIRA decisions than OMB Watch. Our report states unequivocably at the start that "our *Monthly Review* has reported many of OIRA's decisions on a case-by-case basis...Now there are numbers to support the anecdotal evidence." In other words, our analysis of the empirical data is leavened by our case-by-case experience.

---

[1] Letter to Ms. Eleanor Chelimsky, Assistant Comptroller General, GAO, from James B. MacRae, Jr., November 15, 1989.

With regard to the GAO study, OMB fails to mention that GAO did analyze the same data set as OMB Watch. Neither OMB Watch nor GAO relied solely on numbers or case studies to reach its conclusions.

OMB's problem is not with the methodological approaches used by OMB Watch or GAO, it is with the strikingly similar conclusions each organization reached. OMB's head-in-the-sand, no-problem viewpoint is inconsistent with the rest of the world's. Not only have GAO and OMB Watch highlighted problems, other studies have as well, such as an analysis of OIRA review of Centers for Disease Control (CDC) research by Harvard University that also showed OIRA's selective use of its powers in reviewing CDC research. Numerous congressional hearings have also pointed out OIRA substantive interference in agency decision-making – mostly about health, safety, and environmental issues.

Even one of OIRA's greatest allies, the small business community, provides a crowning blow to OMB's portrait that its paperwork review decision-making is even-handed. The small business community has been one of the most vocal critics of the increased paperwork faced by industry and small business. Everyone acknowledges that paperwork burdens have increased and that OIRA is not focusing its attention on areas of the most burden.

Finally, no empirical or anecdotal studies have shown that OIRA has been doing a good job – that its decisions are even-handed and without bias. Even OIRA, itself, after 10 years of implementing the law, has not made publicly available a thorough study of its own data.

Instead, OIRA simply ignores the facts. It continues to dismiss criticisms of its expertise, its procedures, and its bias against health and safety programs. This blind refutation – contrary to empirical and andecdotal research, congressional review and hearings, and agency comments – has added to the problems of developing constructive alternatives to improving the process at OIRA.

OMB states "that agencies, not OMB, have primary responsibility for carrying out the Act, and some agencies do better than others." This simply hides the real issues. OIRA has not given "primary responsibility" to agencies – otherwise OMB Watch and Congress would not be innundated with case examples of OIRA interference.

OMB's rebuttal also takes a slap at the paperwork review process at agencies, other than the IRS. OMB argues that the IRS, "aware of the tremendous paperwork burden of tax forms, has instituted a rigorous internal review process that usually produces information collection proposals consistent with the Paperwork Act, given the technical complexities of tax issues and the explicit and detailed requirements of the tax laws." Does OMB mean to say that the peer review process in research agencies, or the intricacies of scientific risk assessment do not meet an OIRA standard for a "rigorous internal review process?" Does OMB mean to suggest that research and statistical collections do not have the "technical complexities of tax issues?" OR does OMB mean that it simply defers to IRS because OIRA staff lack the expertise to evaluate that agency's forms?

Specific Response to OMB's Rebuttal

1. OIRA targets health and safety agencies.

OMB criticizes our report as being based on "selective presentation of the data." Yet the rebuttal is apparently based on selective reading of our report.

First, OMB apparently does not disagree that EPA and OSHA have had greater problems with their paperwork submissions than other agencies. Rather, OMB believes our conclusion that health and safety agencies are targeted should not be based on the fact that EPA and OSHA have had a much harder time getting OIRA paperwork approvals than other government agencies. This is illuminating in itself; if OMB concurs with the data that EPA and OSHA have had greater problems with OIRA reviews, then they make our case of biased reviews for us.

Our conclusion that OIRA targets health and safety agencies was based on more than simply the EPA and OSHA data. For example, OMB claims that we did not include other health and safety agencies beyond OSHA and EPA when discussing targeting. Yet on page 16 of our report, in a chart titled "1988 Disapproval Rates for Various Functions," we define health and safety to include: Occupational Safety and Health Administration, Mine Safety and Health Administration, Food and Drug Administration, Centers for Disease Control, Food Safety and Inspection Service, and Consumer Product Safety Commission. The chart, replicated below, shows by this definition, health and safety paperwork has a greater problem rate than the government-wide average. The chart also shows that environmental paperwork has the toughest time getting through OIRA, followed by statistical paperwork.

1988 Disapproval Rates for Various Functions

Area	# of Proposals Reviewed	# Disapproved & Withdrawn	Problem Rate (%)
Environment[1]	210	20	9.5%
EPA (alone)	110	17	15.5
Statistics[2]	102	8	7.8
Health & Safety[3]	135	6	5.2
TOTAL GOV'T	**2,545**	**105**	**4.1**
Human Services[4]	410	16	3.9
Procurement & Small Business[5]	116	4	3.4
Treasury (total)	325	11	3.4
IRS (alone)	179	4	2.2

1 Includes: EPA, Interior, and selected portion of Energy

2 Includes: Census Bureau, Bureau of Economic Analysis, Economic and Statistical Analysis, National Agricultural Statistical Service, Human Nutrition Information Service, Bureau of Mines, Bureau of Labor Statistics

3 Includes: Occupational Safety and Health Administration, Mine Safety and Health Administration, Food and Drug Administration, Centers for Disease Control, Food Safety and Inspection Service, and Consumer Product Safety Commission

4 Includes: Food & Nutrition Service, HHS programs (HCFA, SSA, FSA, OHDS, HSA, IHS), Employment and Training, HUD (Community Planning & Development, Office of Housing), ACTION, Leegal services, and Architectural and Transportation Barriers Compliance Board

5 Includes: Federal Acquisition Regulations, procurement forms from Defense Department, GSA, and governmentwide forms and regulations, and forms affecting small businesses from Small Business Administration

OMB's argument that "by the law of averages, some agencies will be high, some low" is absurd. This is not a crap shoot; this is supposed to be careful review by trained professionals, not a game controlled by the law of averages.

The data we presented is consistent with the conclusion that health and safety agencies have been targeted by OIRA. But, as described below, our conclusion was not simply based on paperwork reviews, but rather the panoply of OIRA powers.

Second, our report clearly states (when discussing the empirical data on page 8): "Note that paperwork submitted by EPA and OSHA is more than three times more likely not to be approved than the average government information collection proposal." We do not make the claim on the basis of the data presented on page 8 that health and safety agencies are targeted by OIRA – simply that EPA and OSHA have been targeted.

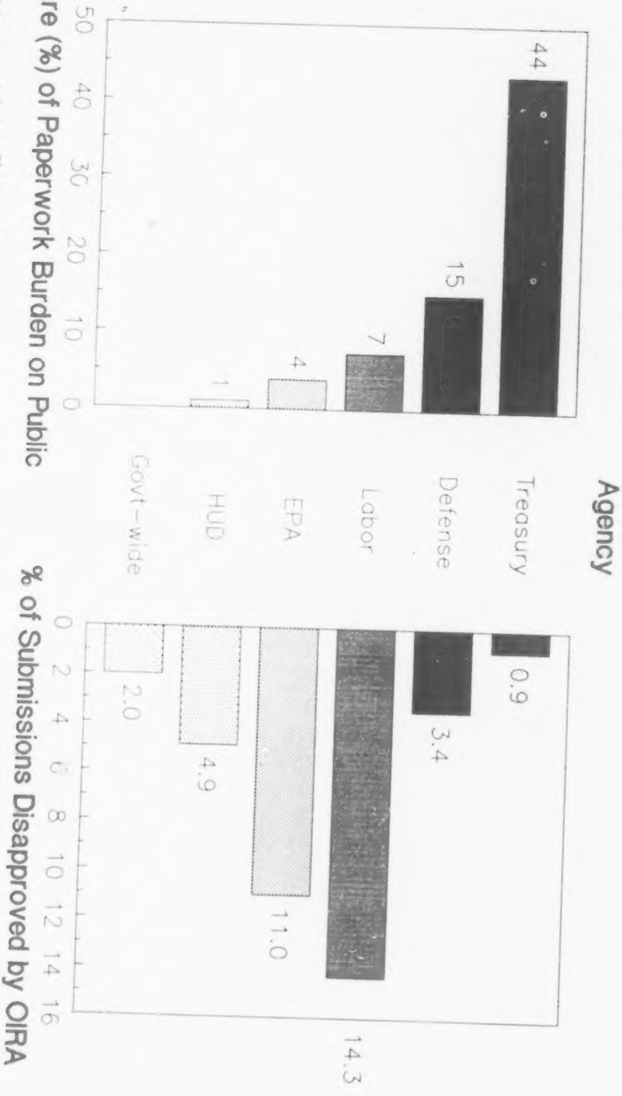
Third, OMB cannot refute the claim that it has used its power disproportionately. OIRA assigned four Desk Officers to review EPA's submissions – even though the agency's paperwork, by OIRA's own accounting, made up only about 4 percent of all paperwork burden during 1988. On the other hand, OIRA assigned only one Desk Officer to Treasury (exclusive of the Comptroller of the Currency's office, which submitted 10 proposals) – even though Treasury accounted for 43.5 percent of all federal paperwork burden.

Fourth, our actual text in the Executive Summary states: "OIRA has targeted health and safety agencies for paperwork and regulatory relief." Our analysis to support this statement is based on a review of OIRA's disapproval of regulatory paperwork, which is considerably higher among health and safety agencies than all government agencies. Our statement is also supported by data regarding OIRA's E.O. 12291 reviews, which show that regulations from HUD, Labor, EPA, and HHS were much more likely to be returned or changed by OIRA or withdrawn by agencies than all government regulations.

Fifth, OMB argues that it was unfair of OMB Watch to include disapprovals, withdrawals, and approvals of less than six months in its analysis. Since we have documented evidence (see below, as well as our past *Monthly Reviews*) that OIRA has forced agencies to withdraw paperwork proposals and has repeatedly used short-term approvals as a vehicle for forcing agencies to make changes consistent with OIRA's desires, we disagree with OMB. Nonetheless, as the chart on the next page shows, even when only including disapprovals, the problem remains:

- OIRA disapproved 14.3% of OSHA/MSHA paperwork proposals even though it accounted for less than 7% of all government paperwork burden;
- 11% of EPA paperwork was disapproved even though it accounted for about 4% of paperwork burden;
- 4.9% of HUD paperwork was disapproved even though it accounted for less than 1% of paperwork burden;
- Meanwhile the agency with the largest paperwork burden, Treasury, (44%) had less than 1% of its paperwork disapproved; and
- Defense, which accounts for 15% of all paperwork, had only 3.4% of its paperwork disapproved.

Share of Agency Paperwork Burden Compared to OIRA Disapproval Rates



Agencies shown add to 71% of total burden.

Sources: Information Collection Budget, FY 1989
OIRA monthly "Action Lists", Jan.-Dec. 1989

Disapproval rate for Labor just includes OSHA/MSHA

No matter how you cut the data, the fact remains that OIRA has used its powers disproportionately to focus on social concerns, such as health, safety, and environmental issues.

2. The validity of OMB Watch statistics.

OMB takes the case of OSHA to show that we have used invalid numbers. Our report states that OIRA reviewed 29 information collection proposals from OSHA during 1988. OIRA claims it reviewed 35 proposals.

Attachment A includes, for the Department of Labor, OIRA's *Daily Action List By Agency* for each month of 1988. We have boxed those submissions from OSHA. The total number of submissions equals 29.

It may be true that OIRA reviewed 35 proposals. If so, it raises serious questions about the information OIRA is making publicly available about its reviews.

While OMB Watch did not discuss in its report the problem of obtaining information for the analysis, we will here. We first requested (and agreed to pay for) an OIRA paperwork data tape in the spring of 1987. We did not receive the tape until the end of 1987. It turned out, however, that the tape did not have the data we had requested. A second tape was made available to us in mid-1988 by OIRA. It also had the wrong data. A third tape was given to us near the end of 1988 – it also did not have the information we had requested.

With each tape we had to expend additional resources in the attempt to "untangle" the data. In the end, as our footnote in the report indicates, we gave up. Instead, we used OIRA's publicly available monthly paper "action lists" and put the information into our own database. The footnote also indicates that OIRA's lists failed to include at least 12 paperwork decisions that we had found through our case-by-case analyses.

3. OIRA and "independent review" of paperwork.

OMB argues that "OMB Watch does not accept the Paperwork Reduction Act's goal of 'independent review.'" OMB, unfortunately, has misunderstood our concern. We have no problem with centralized reviewed of paperwork, which is exactly why we strongly support the Paperwork Reduction Act. Our problem with OIRA arises over its substantive interference with agency activities. We do not believe the Act intended to give OIRA carte blanche authority to change questionnaires, force the Census to change a sample size, or otherwise usurp expertise that resides in agencies.

First, OIRA has shown that it lacks the qualifications to conduct such review. The OIRA desk officers lack the professional and educational backgrounds to conduct the sort of review they do. Our conclusion is supported most emphatically by the GAO report *Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability*, September 1989 (GAO/PEMD-89-20), and our own report.

Second, OMB review all too often does not focus on independent review of information activities, but rather involves a distinctly biased review of substantive agency decisions, as indeed the U.S. Supreme Court recently found in *Dole v. United Steelworkers* (February 21, 1990). Consider the following examples:

(1) In November 1987, OIRA Desk Officer Nicholas Garcia instructed EPA to re-evaluate the need for selective auto emissions testing at the manufacturing stage:

> "Because of the costs of...[recalling vehicles for failure to meet emissions standards], both in terms of bad publicity and actual expenditures, vehicle manufacturers make every effort to ensure that their vehicles are properly made and sufficiently durable to pass these tests. Therefore, the need for a Selective Enforcement Audit Program is not clear."

(2) On March 23, 1987, OIRA Desk Officer Shannah Koss-McCallum explained OIRA's delay in acting on the FDA proposed food labeling/health claims requirement "because we believe it unduly restricts claims beyond what is currently allowed in advertising." She then stated her preference to "let the marketplace, not the government, set the agenda for the types of claims that will be made."

A year and a half later, Ms. Koss-McCallum again objected to the FDA's proposal as "drastically limiting the scope of permissible messages." She went on to say:

> "OIRA staff believe that what FDA has done is so antithetical to the Administration's previous stand, and so contrary to the concept of commercial free speech, that not issuing a rule and continuing case-by-case enforcement efforts would be better than adopting the rule as currently drafted."

(3) When Acting OIRA Administrator James MacRae testified before the Governmental Affairs Committee on February 21, 1990, he submitted for the record a "Review of Allegations of OMB Interference." Among the decisions defended is OIRA's objections to the FDA's proposal for standard tampon labeling (see pages 20 - 21). OIRA's rebuttal concludes with the following:

> "It is highly doubtful that millions of women are at risk because: 1) information on the relationship between TSS [Toxic Shock Syndrome] and tampons has been provided in and on tampon packaging since 6/82; 2) if a consumer wants to avoid the risk she can use sanitary napkins; 3) most women are brand loyal; and 4) there is no evidence that consumers will change their behavior on the basis of the labeling."

These three examples are striking for the extent to which OIRA has concerned itself not with paperwork reduction or even information resources management, but rather with the substantive policy choices and program objectives of the agency. Needless to say, absolutely nothing in the Paperwork Reduction Act suggests that these are matters for OIRA to question and overrule.

As to the charge that OMB Watch simply accepts agency rationales for information collection proposals: unlike OMB, we do not claim to have the expertise to overrrule substantive decisions by agency professionals. We understand our role to be one of exploring and exposing the form and substance of paperwork clearance decisions. Thus, we try only to juxtapose OIRA decisions and comments with agency proposals and explanations.

4. The Paperwork Reduction Act and the APA

OMB dismisses criticisms of its interference with agency rulemaking under the guise of paperwork review by saying no conflict between the APA and the PRA has been challenged in court and because OMB has had "ten years of success with coordinating APA with PRA procedures." We must disagree.

OIRA's authority to review information collections required by regulations is simply not the undisputed matter OIRA would have one believe. First, the so-called Kennedy Amendment to the 1980 Act (codified at 44 U.S.C. 3504(h)) was not meant to help OIRA "coordinate the public participation rights" of the APA and the PRA. Quite the contrary, it was explicitly intended to limit OIRA's ability to overrule agency regulations.

For example, section 3504(h)(5)(C) states that OMB may only disapprove a final rule's paperwork requirements if it finds that the agency's response to its comments was "unreasonable." OMB is simply wrong when it says that that provision is meant to prevent OMB from disapproving paperwork in a final rule if it had not objected at the NPRM stage. That restriction is spelled out in the preceding subsection – (h)(4). The (h)(5)(c) "unreasonable" restriction was meant to place a higher burden on OMB review of regulatory paperwork than simply a finding of "unnecessary for the proper performance of the agency's function." In other words, Congress meant for OMB to defer more to the agency at the final rule stage.

Our experience has led us to the conclusion that OMB has not afforded agencies that required deference. Part of the reason for this is our second criticism of OMB's treatment of regulatory paperwork, namely OMB's expansion of its power beyond that set forth in the Kennedy Amendment. While the Kennedy Amendment created a procedure for the review of information collections required by proposed regulations, OMB asserted that it could also review information collections required by current regulations. In 1982, the Department of Justice found that this was indeed overreaching by OMB (Memorandum from Theodore B. Olson, Assistant Attorney General, to C. Boyden Gray, Michael J. Horowitz, and Peter J. Wallison, June 22, 1982). Unfortunately, a subsequent administrative agreement (a settlement of sorts among OMB, Justice, and Treasury) allowed OMB to get at current regulatory requirements under a tortured misreading of the Act. In any event, the record of this controversy and OMB's efforts to get around the restrictions of the Kennedy Amendment are set out in "The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law," William F. Funk, *Harvard Journal on Legislation*, Vol. 24, No. 1, page 1 (Winter 1987).

The result of OIRA's self-appointed review of paperwork required by current regulations allows it, among other things, to circumvent the Kennedy Amendment's "unreasonable" standard completely. All OIRA has to do is wait for a regulatory requirement to be issued and then simply instruct the agency to enter rulemaking to change it because

OIRA finds the requirement to be "unnecessary." This route is seen in OIRA's frequent short-term approvals of regulatory paperwork. While these OIRA decisions are coded as "approvals," they actually are an instruction to the agency to change the regulatory information collection requirement. Examples of this can be seen in OIRA's repeated attempts to force agencies to replace recordkeeping requirements with self-certification requirements. (See discussion of MSHA and OSHA in the *Monthly Review,* OMB Watch, Vol. V, No. 8, p. 4 (August 31, 1989).)

The point of our criticism is not that anyone has been able to successfully sue OMB for violating one of the provisions of the APA, but that OMB has used the Paperwork Reduction Act to insinuate itself into agency regulatory decision-making in ways that subvert the principles underlying the APA. The examples given in *Playing the Numbers* are thus important, not because of violations of APA procedure, but because of substantive interference in agency decision-making. After all, the APA was not written for the sake of mere procedural uniformity, but rather to protect the integrity of agency regulatory decisions. The avenues OIRA has learned to take into the substance of agency regulations proves that the APA protections are inadequate.

The examples we gave in *Playing the Numbers* give substance to our assertion; again, not of literal violations of procedural APA requirements, but of substantive interference with an agency's ability to exercise its rulemaking authority consistent with its legislative mandate. This same conclusion was reached by the U.S. Supreme Court in *Dole v. United Steelworkers*(February 21, 1990).

5. OMB Watch's definition of "problems" agencies face.

OMB claims that we unfairly lump disapprovals, short-term approvals, and agency withdrawals together to create a distorted picture of agency proposals that have run into difficulty at OIRA. We have addressed this concern above by indicating that we have repeated evidence that OIRA forces agencies to withdraw paperwork proposals and has used short-term approvals to force agencies to make changes consistent with OIRA's determinations.

One example of OIRA forcing an agency to withdraw a paperwork proposal came to light recently. In a December 12, 1989 memo to OIRA Desk Officer Jim Houser, another OMB staff member wrote: "I recommend that you try to get Ed [Dept. of Education] to withdraw this package." On January 18, 1990, OIRA recorded a decision on the proposal: "This information collection is withdrawn at the request of Pat Sherrill [of ED]." See Attachment B for a copy of the memo and the OIRA decision.

Another example of OIRA misusing its "withdrawal" category concerns an HHS study on the National Survey of Health and Sexual Behavior. OIRA claims that "HHS made the decision to withdraw the survey request..." But OIRA does not explain that a Desk Officer telephoned HHS to ask for additional materials to justify this AIDS survey. The Desk Officer instructed HHS to submit such information on an SF-83 form. By submitting the information on the form, OMB was free to log-in the additional material as a "new" submission and record the previous submission as withdrawn. Most important, that permitted OIRA to extend the review beyond the legislatively mandated 90-day time limit.

An example of a short-term approval that captured the nation's attention was the Hazard Communication Standard. OIRA approved the Standard for several months. In its approval, but instructed OSHA to make several regulatory changes if it wanted the normal three-year approval. In effect, the OIRA decision was actually a disapproval, but was logged as an approval. This example demonstrates that cases involving short-term approvals can involve significant policy shifts initiated by OIRA, but would not be counted as a "problem" if only counting disapprovals.

Because of the importance of how short-term approvals can affect agency decision-making, we warned on page 10 of our report: "Much more research needs to be done in this. Our preliminary analysis indicates that 35 percent of approvals for six months or less are for regulatory paperwork...An empirical analysis of OIRA reviews of regulatory paperwork during the proposed and final rule stages would contribute to a better understanding of what happens during OIRA review and whether OIRA's actions violate the intent of the APA."

We still believe such research would provide a better understanding of how OIRA uses short-term approvals.

OMB states, "Genuine disagreements account for fewer than 10 percent of the 'problems' identified by OMB Watch." This is clearly a skewed perspective as demonstrated by congressional findings, further elaboration on some of the case-by-case examples that OMB rebuts, and the chilling effect OIRA reviews have had on agency initiatives. OMB's concept of "genuine disagreement" continues to be at odds with almost everyone else.

Response to OMB's Rebuttal of Specific Cases

OMB's rebuttal of *Playing the Numbers* serves to reinforce one of the major points of our report – simply that OMB is involved in a significant way in changing the substance of agency proposals; its decisions often involve micro-managing agency functions, functions delegated to agencies by Congress.

OMB's rebuttal included a response to 14 of 25 cases described in our report. While we could respond to all 14 cases, we thought it appropriate to respond to several to demonstrate how OIRA has tried to skew the record.

Hazard Communication Standard.

Because the OMB rebuttal is dated March, 1990 – the month after the Supreme Court's decision in *Dole v. United Steelworkers of America* – we were surprised to see that OMB still regards the worker right-to-know standard as a massive paperwork burden. In its February 21 decision, the Court decisively ruled that it was not paperwork as defined by the Paperwork Reduction Act. In addition, the Court found that OMB's paperwork review of the standard had undermined a "substantive regulatory choice" made by OSHA, and that the Paperwork Reduction Act did not "authorize OMB to determine the usefulness of agency-adopted warning requirements to those being warned."

As OMB asserts, our report did not mention congressional hearings critical of the "paperwork burden" of the standard. We also did not mention congressional hearings critical of OMB's interference in the development of the standard, which OMB does not mention.

Finally, OMB claims that its decision about the standard "flowed directly from the public participation process established by the PRA." If that is so, then OMB's public participation process is seriously flawed with a distinct bias toward the regulated community. OMB's rebuttal neglects to mention that OMB Watch participated in that "public participation process" and has publicly decried the process. Nor does OMB's rebuttal describe that process, which was largely dominated by the regulated industry. In fact, OMB initiated a public meeting because the regulated community was seeking "regulatory relief," which the community felt neither OSHA nor the courts had given it. Thus, even though the Third Circuit Court of Appeals had twice told OSHA to issue an expanded standard based on the existing rulemaking record or justify why it could not, OMB interceded. This is clearly not "independent review," nor is it among the stated goals of the Paperwork Reduction Act. And the Supreme Court has spoken to this abuse.

As an aside, as mentioned earlier in this letter, OMB is now calling its decision on the standard a disapproval, when, in fact, it was initially logged as an approval.

Bloodborne Diseases.

OMB claims that OSHA withdrew the survey because it was intended to collect information for a rulemaking "if the agency decided to proceed with rulemaking." OMB says OSHA withdrew the survey because the agency had not yet decided to proceed with rulemaking.

The Senate Labor Committee reached a different conclusion after holding OSHA oversight hearings in the spring of 1988. The committee based its conclusions on documents released and testimony received at the hearings.

Career OSHA officials (subpoenaed to testify) told the committee that it was OMB that made the decision that OSHA should not proceed with rulemaking, although OSHA staff recommended drafting a notice of proposed rulemaking in 1986. OSHA didn't issue anything until a year later—an advance notice of proposed rulemaking (ANPRM) instead. The Committee produced evidence affirming the fact that OMB had inserted language in the ANPRM stating that OSHA had not yet decided whether a rule was necessary.

Lead.

OMB claims that OSHA withdrew this survey because "in the face of the court deadline, that it had time to visit only eight firms to collect data. OSHA did not need OMB approval to visit eight firms."

Three separate sources—both inside and outside the agency—painted a different story when contacted about this case by OMB Watch. They said that it was OMB that tried to limit the OSHA site visits.

According to one source, OMB discouraged OSHA from doing the surveys and then limited the site visits to the number of plants that were willing to participate. The source added that OMB did indeed have final approval on the number of site visits OSHA conducted and approved those visits in "dribs and drabs – three here, three there as long as the industry was asking for it."

Another source told OMB Watch that OMB had even limited the number of phone calls that OSHA could make for this effort. In fact, the source said he was asked by someone to call the person doing the economic analysis so that the staff person wouldn't have to call him. The reason: OMB had limited the OSHA staff to placing seven phone calls.

Dress Rehearsal for the 1990 Census.

No one else familiar with the events surrounding OMB's review of the Census questionnaire agrees with OMB's evaluation of what happened. This Committee need only refer to testimony presented before it by Senator Paul Sarbanes, who chaired Joint Economic Committee (JEC) hearings on the matter in the summer of 1987.

Here's a brief examination of OMB's version of events:

OMB claims that the Census questionnaire submitted in June, 1987, provided "the first opportunity for OMB to examine the final cut proposed by the Census Bureau."

OMB also offered this explanation to the JEC in 1987. The explanation did not satisfy the committee. As even OMB conceded, it was involved with a federal advisory council on the 1990 census, which had been meeting for more than three years before the submission.

OMB claims that "more efficient statistical designs developed by Census Bureau staff had been inadequately considered in the rush to meet the target date for the dress rehearsal."

As far as we can tell, this is a new explanation for OIRA's actions. Suffice it to say that the statistical design OMB wanted the Bureau to use has been widely discredited, for example, in hearings by the House Select Committee on Aging and its Subcommittee on Housing and Consumer Interests (Comm. Pub. No. 100-663) and a joint congressional letter for President Reagan (which OMB cites).

OMB admits that it had indeed "participated" in review of Census tests and interagency discussions about the Census for several years, yet the Bureau's June, 1987, submission "provided the first opportunity for OMB to examine the final cut proposed by the Census Bureau."

The JEC did not agree. Rather, Chairman Sarbanes noted that:

> "[L]iterally at the 11th hour, as we move toward the dress rehearsal, OMB

> has raised with the Census Bureau an extensive series of questions about a large part of the proposed survey. It really leads one to wonder what has been going on all these years." ("OMB Proposal for Severe Cuts in the 1990 Census," Hearing before the Joint Economic Committee, S. Hrg. 100-603, August 7, 1987, p. 368)

OMB claims further that it advised the Census Bureau "early in the review to allow them time to supplement their justification."

OMB took 37 days to respond to the Census Bureau's submission. The Paperwork Reduction Act gives OMB a maximum of 90 days to review agency submissions that are not regulatory. So OMB actually allowed more than one third of the review time to elapse before giving the Bureau any idea that it had problems with the questionnaire.

OMB claims that "since numerous public comments and comments solicited from agencies also failed to resolve some of the issues (such as public resistance to providing data used for housing code enforcement), the initial submission was disapproved."

What OMB's analyses usually fail to mention – as does this one – is just how many letters it received in this case and what they communicated. OMB received nearly 1,000 public comments about its review of the Dress Rehearsal and nearly all of those comments urged OMB to approve the Dress Rehearsal as originally submitted.

In addition, OMB's reference to "public resistance to providing data used for housing code enforcement" is little more than a red herring OMB has raised in Congress before. Neither the JEC nor the Select Committee on Aging was convinced by this argument.

Conclusion

Improvements in the paperwork and regulatory review process are seriously needed. Notwithstanding OMB's single-minded view that there are no "political" decisions made at OIRA, most scholars, policymakers, and public interest advocates concur that there are serious problems with OIRA's review process. OMB Watch has strongly supported reauthorization of the Paperwork Reduction Act. But OIRA's reluctance to acknowledge the problems makes it ever so difficult to fashion improvements.

Sincerely,

Gary D. Bass

Gary D. Bass, Ph.D.
Executive Director

cc: Senator Jeff Bingaman
Senator Warren Rudman

ATTACHMENT A
OIRA's "Daily Action List By Agency" For Department of Labor, 1988

OSHA submissions are boxed and total 29

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THE DAILY ACTION LIST BY AGENCY
01/01/88 - 01/31/88

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	OMB NUMBER	DATE RECEIVED IN OMB	REQUEST CLASS	REVIEWER	AGENCY FORM NUMBER(S)		ACTION DATE	EXPIRATION DATE	ACTION CODE	
1.	1218-0092	10/22/87	3	SCOTT H. JACOBS LEAD STANDARD		47	01/27/88	01/31/91	R 2	λ ✓
2.	1218-0142	12/02/87	2	SCOTT H. JACOBS A SURVEY TO DETERMINE THE EFFECTS OF UPDATING THE PERMISSABLE EXPOSURE LIMITS (PEL'S) FOR SUBSTANCES REGULATED UNDER 19 CFR 1910.1000		41	01/12/88	06/30/88	D 2	X
	1219-0004	12/16/87	3	SCOTT H. JACOBS ROOF CONTROL PLANT (30 CFR 75.220)		30	01/15/88	01/31/91	R 2	
	1219-0026	10/29/87	5	SCOTT H. JACOBS GROUND CONTROL PLAN (30 CFR 77.1000 AND 77.1000-1)		24	01/21/88	01/31/91	R 2	
	1219-0046	10/29/87	4	SCOTT H. JACOBS ESCAPE AND EVACUATION PLAN (30 CFR 57.11053)	MSHA-400	84	01/21/88	01/31/91	R 2	
	1219-0048	11/17/87	4	SCOTT H. JACOBS RESPIRATOR PROGRAM RECORDS (30 CFR 56.5005 AND 57.5005)		65	01/21/88	01/31/90	R 2	
	1219-0051	10/29/87	4	SCOTT H. JACOBS FIRE PROTECTION - ESCAPE AND EVACUATION PLAN (30 CFR 77.1101)	MSHA-232R	65	01/22/88	01/31/91	R 2	
	1219-0060	11/17/87	4	SCOTT H. JACOBS IMPOUNDMENT AND REFUSE PILE PLANS AND REVISIONS (30 CFR 77.215-2(A) AND (B)(1) THROUGH (3), 77.216, AND 77.216-2)	MSHA-217	65	01/21/88	01/31/91	R 2	
	1219-0100	12/23/87	5	SCOTT H. JACOBS PRODUCT TESTING BY APPLICANT OR THIRD PARTY, 30 CFR PART 7		20	01/12/88	03/31/88	R 2	X ✓
	1220-0044	11/18/87	3	MILO B. SUNDERHAUF BASIC QUESTIONNAIRE, CPP-1, CHECKLIST A, CPP-2A, CHECKLIST B, CPP-2B, AND RESPONDENT LETTER, CPP-3 - POINT OF PURCHASE SURVEY	CPP-1, CPP-2A CPP-2B CPP-3	57	01/14/88	12/31/90	2	
	1220-0094	11/19/87	3	MILO B. SUNDERHAUF NEW YORK BUSINESS BIRTH SURVEY	BLS/790/BBS	46	01/14/88	10/31/88	2	
	1220-0107	12/22/87	2	MILO B. SUNDERHAUF FEASIBILITY STUDY		38	01/29/88	06/30/89	2	

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	OMB NUMBER	DATE RECEIVED IN OMB	REQUEST CLASS	REVIEWER	AGENCY FORM NUMBER(S)		ACTION DATE	EXPIRATION DATE	ACTION CODE	
	1205-0202	01/12/88	4	JAMES C. MASON SERVICE DELIVERY AREA APPEAL	ETA-RC-54	45	02/26/88	02/29/91	2	
	1205-0211	12/23/87	3	JAMES C. MASON JTPA ANNUAL STATUS REPORT REVISIONS FOR PROGRAM YEAR 1988-89	ETA 8580	65	[illegible]/88	06/30/90	2	
3	1218-0131	12/16/87	6	SCOTT H. JACOBS OCCUPATIONAL EXPOSURE TO TOXIC SUBSTANCES IN LABORATORIES, OSHA 271		64	02/18/88	05/31/88	R 2	X ✓
4	1218-0141	12/02/87	2	SCOTT H. JACOBS FEASIBILITY DETERMINATION - LEAD REMAND INDUSTRIES		65	02/25/88		~~2~~ (9)	✓ O
5	1218-0143	12/23/87	2	SCOTT H. JACOBS REVISION OF MECHANICAL POWER PRESS STANDARD (29 CFR 1910.217) TO REMOVE PRESENCE SENSING DEVICE INITIATION PROHIBITION.		62	02/23/88	02/29/91	R 2	
6	1218-0144	12/30/87	2	SCOTT H. JACOBS RECORDKEEPING FOR GRAIN HANDLING FACILITIES (1) HOUSEKEEPING PROGRAM, S1910.272 (I)(1) (2) EMERGENCY ACTION PLAN, S1910.272(D)		36	02/04/88	02/29/91	R 2	X ✓
7	1218-0145	01/14/88	2	SCOTT H. JACOBS FORMALDEHYDE	FR 1/20	Kamarck [illegible] 19	02/02/88	02/29/91	R 2	X T✓
	1219-0011	11/18/87	4	SCOTT H. JACOBS MINE OPERATOR DUST DATA CARD (30 CFR 70.209, 71.209 AND 90.209)		31	02/18/88	02/29/89	R 2	X ✓
	1220-0108	12/23/87	2	MILO B. SUNDERHAUF EMPLOYER ANTI-DRUG PROGRAM SURVEY		61	02/22/88	12/31/88	2	O

TOTAL FOR AGENCY: 9

52

MARCH

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                                                                                          PAGE 14      X
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Department of Labor                                           OF REQUEST CLASS AND ACTION CODES
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OMB        DATE      REQUEST
NUMBER     RECEIVED  CLASS     REVIEWER
           IN OMB                                         AGENCY
                                                          FORM                      ACTION     EXPIRATION  ACTION
                                                          NUMBER(S)                 DATE       DATE        CODE
....................................................................................................................
1205-0203 01/12/88     3     JAMES C. MASON
   GOVERNOR'S COORDINATION AND SPECIAL SERVICES PLAN (GCSSP)  ETA-RC53         56 03/08/88   06/30/90     2
1205-0204 01/12/88     4     JAMES C. MASON
   STATE JOB TRAINING PLAN
                                                              ETA-RC56         56 03/08/88   06/30/90     2
1210-0059 01/21/88     3     JAMES C. MASON
   PROHIBITED TRANSACTION CLASS EXEMPTION 79-1 AND RECAPTURE
   EXEMPTION                                                                   40 03/01/88   03/31/91     2
1215-0045 02/12/88     3     FEDERAL EDUCATION DATA ACQUISTION COUNCIL FEDAC
   ACCIDENT DATA ON SCHOOL BUS DRIVERS REPORT                 WH-374   FR 2/23/88  25 03/08/88   06/30/89 R   2
1215-0146 01/13/88     4     JAMES C. MASON
   HOUSING TERMS AND CONDITIONS
                                                              WH-521 521A & 521B   61 03/14/88   03/31/91     2
8  1218-0108 02/26/88     3     SCOTT H. JACOBS
   ETHYLENE OXIDE                                             OSHA-265         33 03/30/88   05/31/88 R   2  X
9  1218-0146 01/14/88     2     SCOTT H. JACOBS
   SURVEY TO COLLECT INFORMATION ON BLOODBORNE DISEASES                        62 03/16/88                9
X  1220-0109 01/15/88     2     MILO B. SUNDERHAUF
   NATIONAL LONGITUDINAL SURVEY OF WORK EXPERIENCE OF YOUTH
   QUESTIONNAIRE                                              NORC-4488        59 03/14/88   12/31/88     2
1220-0110 01/15/88     2     MILO B. SUNDERHAUF
   NATIONAL LONGITUDINAL SURVEYS - SURVEY OF WORK EXPERIENCE
   OF YOUNG WOMEN                                             LGT-4141 LGT-4143  59 03/14/88   06/30/89     2
1220-0112 03/08/88     2     MILO B. SUNDERHAUF
   CONSUMER EXPENDITURE SURVEYS VEHICLE LEASING SUPPLEMENT    CE-201   FR 3/11/88  9 03/17/88   12/31/88     2

TOTAL FOR AGENCY: 10

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APRIL

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	OMB NUMBER	DATE RECEIVED IN OMB	REQUEST CLASS	REVIEWER	AGENCY FORM NUMBER(S)		ACTION DATE	EXPIRATION DATE		ACTION CODE	
	1205-0137 OCCUPATIONAL CODE REQUEST	02/10/88	6	JAMES C. MASON	ETA 741	08	04/18/88	12/31/90		2	
	1205-0209 ANNUAL PLANS FOR STATE EMPLOYMENT SERVICE ACTIVITIES	02/12/88	5	JAMES C. MASON	ETA-RC55	04	04/18/88	01/31/91		2	
	1205-0228 PRELIMINARY ESTIMATES OF AVERAGE EMPLOYER TAX RATES	03/29/88	5	JAMES C. MASON		20	04/18/88	04/30/91		2	
	1205-0263 JOB TRAINING PARTNERSHIP ACT (JTPA) MANAGEMENT REVIEW SYSTEM	01/19/88	2	JAMES C. MASON		90	04/18/88	04/30/90		2	
	1215-0145 WORKER INFORMATION	01/13/88	4	JAMES C. MASON	WH-516, 516A & 516B	90	04/12/88	03/31/91		2	
10	1218-0089 INITIAL AND RENEWAL NEW DIRECTIONS APPLICATIONS FOR TRAINING AND EDUCATION GRANT	02/01/88	4	SCOTT H. JACOBS	OSHA-177	80	04/21/88	04/30/91		2	
11	1218-0072 HAZARD COMMUNICATION	03/07/88	3	SCOTT H. JACOBS	OSHA 174 (OPTIONAL MSDS)	37	04/13/88	04/30/91	R	2	
12	1218-0099 RESPIRATORY PROTECTION	03/10/88	4	SCOTT H. JACOBS		47	04/26/88	04/30/89	R	2	X ✓
13	1218-0103 IONIZING RADIATION	01/21/88	4	SCOTT H. JACOBS	OSHA 253	91	04/21/88	05/31/88	R	2	X ✓
14	1218-0139 HAZARDOUS WASTE OPERATIONS AND EMERGENCY RESPONSE, INTERIM FINAL RULE	03/07/88	4	SCOTT H. JACOBS		38	04/14/88	04/30/89	R	2	X ✓
15	1218-0147 SAFETY TESTING OR CERTIFICATION	03/24/88	2	SCOTT H. JACOBS	FR 4/5/88 PNL	12	04/05/88	04/30/91	R	2	✓
	1219-0015 ANNUAL STATUS REPORT AND CERTIFICTION AND WEEKLY INSPECTIONS OF REFUSE PILES AND IMPOUNDMENTS (30 CFR 77.215-2(B)(4) THROUGH (8) & (C), 771.215.3, 77.216-3, & 77.216-4)	01/13/88	4	SCOTT H. JACOBS		99	04/21/88	05/31/88	R	2	X ✓
	1219-0052 ESCAPEWAYS AND ESCAPE FACILITIES (30 CFR 75.1704-2)	02/01/88	4	SCOTT H. JACOBS		80	04/21/88	01/31/89	R	2	

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1219-0066	02/01/88	4	SCOTT H. JACOBS PERMISSIBLE EQUIPMENT TESTING (30 CFR PARTS 11, 15, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 32, 33, 35 AND 36)	MSHA 2000-38 (30 CFR 18.93 18.94)	71 04/12/88	05/31/88 R	2 ^
1219-0082	02/01/88	4	SCOTT H. JACOBS RECORD OF PRESHIFT AND ONSHIFT INSPECTIONS OF SLOPE AND SHAFT AREAS (77.1901)	MSHA-241R	80 04/21/88	04/30/91 R	2
1219-0085	01/13/88	4	SCOTT H. JACOBS FIRST AID TRAINING FOR SUPERVISORY EMPLOYEES (30 CFR 75.1713-3 & 77.1703)		(99) 04/21/88	06/30/89 R	2
1220-0083	01/21/88	3	MILO B. SUNDERHAUF SUPPLEMENTARY DATA SYSTEM		78 04/08/88	04/30/90	2

TOTAL FOR AGENCY: 17

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MAY

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1205-0150	02/01/88	4	JAMES C. MASON	NONMONETARY DETERMINATIONS REPORT	ETA-207		91	05/02/88	04/30/90		2	
1205-0264	02/17/88	2	JAMES C. MASON	FEASIBILITY STUDY ON IMPLEMENTING A SUBSTATE AREA UNEMPLOYMENT INSURANCE BENEFIT PROGRAM			79	05/16/88	09/30/88	O	2	
1205-0265	02/23/88	2	JAMES C. MASON	UNEMPLOYMENT INSURANCE QUALITY CONTROL EVALUATION			90	05/23/88	08/31/88	O	2	X ✓
1210-0016	02/23/88	3	JAMES C. MASON	ANNUAL RETURN/REPORT OF EMPLOYMEE BENEFIT PLANS	5500 5500C 5500R		91	05/24/88	01/31/91		2	
1210-0070	05/04/88	2	JAMES C. MASON	AUGUST 1988 CPS RETIREE HEALTH INSURANCE BENEFITS SUPPLEMENT	CPS-1	FR 5/10	6	05/10/88	09/30/88		2	O ~~PNV~~ X ✓
[illegible]	05/04/88	4	SCOTT H. JACOBS	IONIZING RADIATION	OSHA 253	FR 5/10	6	05/10/88	05/31/91	R	2	PNV
1219-0067	02/01/88	4	SCOTT H. JACOBS	EXAMINATIONS & TESTS OF ELECTRICAL EQUIPMENT (30 CFR 75.313-1, 75.512, 75.703-3(D)(11), 75.800-4, 75.900-4, 75.1001-1, 77.502, 77.800-2, 77.900-2)	235R 234R 238R		91	05/02/88	08/31/89	R	2	X ✓
1219-0083	02/11/88	4	SCOTT H. JACOBS	RECORD OF EXAMINATION FOR HAZARDOUS CONDITIONS (30 CFR 77.1713)			89	05/10/88	05/31/91	R	2	X ✓
1219-0100	03/07/88	3	SCOTT H. JACOBS	PRODUCT TESTING BY APPLICANT OR THIRD PARTY (30 CFR 7.3, 7.4(A), 7.6, 7.7(D), 7.23, 7.43, AND 7.51)			66	05/10/88	05/31/91	R	2	
1220-0111	02/24/88	2	MILO B. SUNDERHAUF	POINT OF PURCHASE (CPP) SURVEY-COMPUTER ASSISTED TELEPHONE INTERVIEWING (CATI)	CPP-3		68	05/02/88	12/31/88	O	2	
1220-0113	03/28/88	2	MILO B. SUNDERHAUF	INTERNATIONAL PRICE PROGRAM U.S. EXPORT PRODUCT INFORMATION	2894D		60	05/27/88	08/31/89		2	
1220-0115	04/04/88	2	MILO B. SUNDERHAUF	INTERNATIONAL PRICE PROGRAM U.S. IMPORT PRODUCT INFORMATION	3007D		57	05/31/88	08/31/89		2	

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	1205-0213	03/02/88	4	JAMES C. MASON	IMPLEMENTING REGULATIONS FOR PROGRAMS UNDER TITLE IV OF THE JOB TRAINING PARTNERSHIP ACT			92	06/02/88	06/30/91	R 2	
	1205-0267	03/02/88	2	JAMES C. MASON	STATE ACCOUNT ANALYSES UNEMPLOYMENT INSURANCE (UI)			91	06/01/88	07/31/89	2	
	1205-0268	03/07/88	2	JAMES C. MASON	ALIEN CLAIMANT ACTIVITY REPORT	ETA 9016		88	06/03/88	12/31/89	2	
17	1218-0048	06/17/88	4	SCOTT H. JACOBS	OCCUPATIONAL EXPOSURE TO NOISE	OSHA 238	FR 6/28	5	06/22/88	06/30/91	R 2	PNLV X ✓
18	1218-0065	03/07/88	3	SCOTT H. JACOBS	ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS	OSHA 243		86	06/01/88	08/31/88	R 2	X ✓
19	1218-0095	05/31/88	5	SCOTT H. JACOBS	CONCRETE AND MASONRY CONSTRUCTION			3	06/03/88	06/30/91	R 2	X ✓
20	1218-0151	05/11/88	2	SCOTT H. JACOBS	CRANE OR DERRICK SUSPENDED PERSONNEL PLATFORMS			111	06/24/88	06/30/91	R 2	
	1219-0006	03/07/88	4	SCOTT H. JACOBS	QUARTERLY MINE EMPLOYMENT AND COAL PRODUCTION REPORT (30 CFR 50.30)	MSHA 7000-2		91	06/06/88	06/30/89	R 2	
	1219-0007	03/07/88	4	SCOTT H. JACOBS	MINE ACCIDENT, INJURY AND ILLNESS REPORT (30 CFR 50.20)	MSHA 7000-1		91	06/06/88	06/30/89	R 2	X ✓
	1219-0084	03/07/88	3	SCOTT H. JACOBS	VENTILATION SYSTEM AND METHANE AND DUST CONTROL PLAN (30 CFR 75.316 AND 75.316-1) AND MINE VENTILATION PLAN AND MAP (30 CFR 75.370, 75.371 AND 75.372)			91	06/06/88	09/30/89	R 2	
	1219-0089	03/02/88	3	SCOTT H. JACOBS	SAFETY DEFECTS, EXAMINATION, CORRECTION AND RECORDS (30 CFR 56/57.14100)			91.1	06/01/88	08/31/88	R 2	X ✓
	1225-0043	05/23/88	2	JOHN MORRALL	PRETEST OF THE NATIONAL SAS FARMWORKER SURVEY (SEASONAL AGRICULTURAL SERVICES)		FR 6/1/88	10	06/02/88	07/31/88	O 2	X ✓

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	1205-0200	04/27/88	3	JAMES C. MASON JTPA FINANCIAL STATUS REPORT, AND JTPA SUMMER PERFORMANCE REPORT	ETA 9009 9010	72	07/27/88	12/31/90	2	
	1215-0112	03/19/88	5	JAMES C. MASON REQUEST FOR EARNINGS INFORMATION	LS-426	84	07/21/88	07/31/91	2	x
21	1218-0004	04/25/88	4	SCOTT H. JACOBS QUARTERLY REPORT OF STATE COMPLIANCE ACTIVITY AND MIGRANT HOUSING INSPECTION/VIOLATIONS REPORT	OSHA 120 120A, 124 124	75	07/08/88	07/31/91	2 R	
22	1218-0148	04/04/88	2	SCOTT H. JACOBS SURVEY OF FACILITIES FOR REGULATORY IMPACT ANALYSIS OF PROPOSED REVISIONS TO OSHA STANDARDS FOR FOUR ETHYLENE { Hundred GLYCOL ETHERS		→ 94	07/06/88	12/31/88	R 2	X ✓
	1220-0034	05/19/88	3	MILO B. SUNDERHAUF CPI HOUSING SURVEY	BLS222.011/R BLS222.021/R BLS222S, BLS222I BLS222R BLS222NC	71	07/18/88	06/30/91	2	
	1220-0038	06/10/88	3	MILO B. SUNDERHAUF EMPLOYMENT COST INDEX	BLS 3038A, B, C, D E-T, E-M	46	07/25/88	11/30/90	2	

TOTAL FOR AGENCY: 6

73.67

avg 73 days

AUG

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1205-0238	05/31/88	4	JAMES C. MASON		66	08/04/88	08/31/91	R 2 ✓
INCOME AND ELIGIBILITY VERIFICATION: FINAL RULE								
1215-0148	06/21/88	5	JAMES C. MASON	WH-501, 501A	44	08/03/88		⑨ ✓
STATEMENT OF EARNINGS								
1215-0162	06/17/88	4	JAMES C. MASON		61	08/24/88	06/30/91	R 2
GENERAL REGULATIONS UNDER THE WALSH-HEALEY PUBLIC CONTRACTS ACT, 41 CFR PART 50-201.101(A)(2)(I) AND (II), 50-201.501, 50-201.604(A) AND (C)								
23 1218-0121	05/19/88	4	SCOTT H. JACOBS	OSHA 201	82	08/08/88	12/31/88	R 2
POWERED PLATFORMS FOR EXTERIOR MAINTENANCE								
1219-0069	05/10/88	3	SCOTT H. JACOBS	MSHA 5000-4 5000-7	84	08/01/88	09/30/89	R 2
QUALIFICATION AND CERTIFICATION PROGRAM (30 CFR 75.100, 75.155, 77.100 AND 77.105)								
1219-0089	08/24/88	3	SCOTT H. JACOBS		6	08/29/88	08/31/91	R 2 ✓
SAFETY DEFECTS, EXAMINATION, CORRECTION AND RECORDS (30 CFR 56.14100 AND 57.14100)								
1220-0032	06/21/88	3	MILO B. SUNDERHAUF	BLS 3023CA 3023C, 3023P 3023V 3023R USED IN FY 1988)	67	08/26/88	06/30/91	2
STANDARD INDUSTRIAL CLASSIFICATION (SIC) REFILING FORMS								

TOTAL FOR AGENCY: 7

6 rev
1 ext

avg 60 days

SEPT

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1205-0015	06/21/88	5 ext no chg	JAMES C. MASON APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION (temp. waiver of requirement to show expir. date)	ETA 750 A B	88	09/16/88	06/30/89 R	2	GP: ? pkl ✓
1205-0192	07/18/88	4	JAMES C. MASON PETITION FOR ADJUSTMENT ASSISTANCE/SOLICITUD DE ASSISTENCIA PARA ADJUSTE	ETA-8569 8559 (SPANISH)	72	09/27/88	08/31/91	2	
1205-0243	07/06/88	5	JAMES C. MASON SERVICE DELIVERY AREA REORGANIZATION PLAN APPEALS		84	09/27/88	08/31/91	2	
1205-0269	06/22/88	2	JAMES C. MASON EVALUATION OF TEENAGE PARENT EMPLOYABILITY DEMONSTRATION PROJECTS		60	09/20/88	08/31/90	2	
1205-0270	07/01/88	2	JAMES C. MASON STATE EMPLOYMENT SECURITY AGENCY COMPLIANCE REVIEW SYSTEM		53	09/22/88	06/30/91	2	
1210-0040	08/02/88	6	DIANA ROWEN SUMMARY ANNUAL REPORT		44	09/14/88	06/30/89	2	GR pkl
1215-0072	09/13/88	3	JAMES C. MASON OFCCP RECORDKEEPING/REPORTING: SUPPLY AND SERVICE expedited - "app - 90 days only - resubmit/justify" Fed Contract Compliance	CC-60-2 FR - None. Violation. 2nd review, FR ~ 10/14	1	09/13/88	06/30/89 R	2	✓ misg
1215-0148	08/03/88	6	JAMES C. MASON WAGE STATEMENT (ENGLISH AND SPANISH)	WH-501, 501A w/drawn 8/3	31	09/02/88	08/31/91	2	———
1215-0149	06/27/88	5	JAMES C. MASON FORM WH-347, OPTIONAL USE PAYROLL FORM UNDER THE DAVIS-BACON ACT	WH-347	78	09/12/88	08/31/89 R	2	
1215-0168	07/21/88	2	JAMES C. MASON WORK-DAY REPORT	ESA-92	44	09/02/88	08/31/91	2	———
1215-0169	07/21/88	2	JAMES C. MASON 29 CFR PART 502 - REPORTING AND EMPLOYMENT REQUIREMENTS FOR EMPLOYERS OF CERTAIN WORKERS EMPLOYED IN SEASONAL AGRICULTURAL SERVICES		44	09/02/88	08/31/91 R	2	* ✓✓
1225-0017	07/08/88	6	JOHN MORRALL AUDIT RESOLUTION AND APPEAL REQUIREMENTS FOR REVIEW AND APPROVAL		[illegible]	09/08/88	06/30/91	2	

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1225-0038	07/11/88	4	JOHN MORRALL		61	09/09/88	09/30/91	2	
SALARY OFFSET									
* 1225-0044	08/25/88	2	JOHN MORRALL		65	09/27/88	12/31/88	2	0✓ pktr✓ msgr
NATIONAL SAS FARMWORKER SURVEY (SEASONAL AGRICULTURAL SERVICES) ★ Msgr.									

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TOTAL FOR AGENCY: 14

5 New
3 rev
6 ext

56.29

Avg 56 days

OCT

X

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1205-0033 JOB CORPS HEALTH QUESTIONNAIRE	07/15/88	3	JAMES C. MASON	ETA 6-53	10/14/88	10/31/89	2 ✓
1205-0154 ETA SUMMARIES - UNEMPLOYMENT TRUST FUND ACTIVITIES	08/01/88	3	JAMES C. MASON	ETA 2112 8401 8403 8405 8413 8414	10/18/88	09/30/91	2
1205-0179 UNEMPLOYMENT COMPENSATION FOR FORMER FEDERAL EMPLOYEES HANDBOOK NO. 391 (UCFE)	07/13/88	3	JAMES C. MASON	ES-931 ES-931A ES-935 ES-936 ES-939 ETA 8-32 ES-933	10/04/88	07/31/91	2
1205-0231 JOB TRAINING QUARTERLY SURVEY	07/15/88	3	JAMES C. MASON	JTLS-3 4, 6 103, 203	10/14/88	08/31/90	2 ✓
1205-0271 JOB TRAINING PARTNERSHIP ACT COMPLIANCE REVIEW	07/05/88	2	JAMES C. MASON		10/04/88	10/31/90	2
1210-0071 PROPOSED REGULATION REGARDING ALLOCATION OF FIDUCIARY RESPONSIBILITY, FEDERAL RETIREMENT THRIFT INVESTMENT BOARD	09/06/88	2	DIANA ROWEN		10/18/88	09/30/91	2 R
1215-0103 FECA MEDICAL REPORT FORMS	07/21/88	3	JAMES C. MASON	CA-16, 17 20, 28A, 28B 1090, 1302 1303, 1304 1306, 1308 1316, 1331 OWCP	10/06/88	09/30/91	2
1215-0106 REQUEST FOR MEDICAL REPORTS	08/11/88	5	JAMES C. MASON	LS-158, 415, 525	10/03/88	09/30/91	2
24 1218-0145 FORMALDEHYDE STANDARD: PARAGRAPHS (M)(1)(I) - (M)(4)(II)	07/11/88	4	SCOTT H. JACOBS		10/07/88	10/31/89	2 ✓ R
25 1218-0152 A SURVEY TO DETERMINE THE EFFECTS OF REVISING THE REGULATIONS GOVERNING PPE USAGE, WELDING, AND PULP AND PAPER AND PAPERBOARD MILLS	07/21/88	2	SCOTT H. JACOBS		10/19/88	11/30/88	2 E M O
1219-0015 ANNUAL STATUS REPORT AND CERTIFICTION AND WEEKLY INSPECTIONS OF REFUSE PILES AND IMPOUNDMENTS (30 CFR 77.215-2(B)(4) THROUGH (B) & (C), 771.215.3, 77.216-3, & 77.216-4)	07/28/88	6	SCOTT H. JACOBS		10/03/88	04/30/89	2 - ✓ R
1219-0039 GAMMA RADIATION EXPOSURE RECORDS (30 CFR 57.5047) proposed rule -	09/07/88	4	SCOTT H. JACOBS		10/03/88	01/31/89	2 ✓ R

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1219-0066	07/29/88	6	SCOTT H. JACOBS				
PERMISSIBLE EQUIPMENT TESTING (30 CFR PARTS 11, 15, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 32, 33, 35 AND 36)				MSHA 2000-38 (30 CFR 18.93 18.94)	10/06/88	10/31/91	2 R
1219-0093	09/14/88	6	SCOTT H. JACOBS				
MINE RESCUE EQUIPMENT TEST AND INSPECTION RECORDS (30 CFR 49.6)					10/03/88	04/30/89	2 R
1219-0100	07/06/88	3	SCOTT H. JACOBS				
PRODUCT TESTING BY APPLICANT OR THIRD PARTY (30 CFR PART 7)					10/03/88	05/31/91	2 R

TOTAL FOR AGENCY: 15

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+ 1210-0072 PROPOSED REGULATION RELATING TO THE DEFINITION OF ADEQUATE CONSIDERATION	09/13/88	2	DIANA ROWEN		59	11/10/88		3	✓ R
+ 1215-0013 HOMEWORKER HANDBOOK	11/07/88	6	JAMES C. MASON	WH-75 FR 11/7/88	4	11/10/88	02/29/89	2	✓
26 1218-0068 ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS	08/31/88	3	SCOTT H. JACOBS						
27 1218-0072 HAZARD COMMUNICATION	08/22/88	3	SCOTT H. JACOBS		85	11/23/88	11/30/89	2	✓ R
1219-0106 QUALIFIED PERSON, EXPLOSIVES AND BLASTING (30 CFR 75.1301 (final rule)	10/18/88	2	SCOTT H. JACOBS	OSHA 174 (OPTIONAL MSDS) c. 1st wk Nov. FR 10/25/88 (?)	59 ?	11/19/88	04/30/91	4	✓ R
+ 1220-0026 INTERNATIONAL PRICE PROGRAM - U.S. IMPORT PRODUCT INFORMATION (BLS)	10/31/88	4	MILO B. SUNDERHAUF		21	11/07/88	11/30/91	2	R
+ 1220-0090 PERMANENT MASS LAYOFF AND PLANT CLOSING PROGRAM, REPORTS 1-3 AND SUPPLEMENTAL EMPLOYER INFORMATION REPORT	09/19/88	4	MILO B. SUNDERHAUF	BLS 3007B BLS 3007C BLS 3008 FR 11/7/88 (?)	29	11/28/88	05/31/90	2	☐ no remark.
				BLS 428	71	11/28/88	09/30/89 as requested	2	☐ no remark. R
1225-0045 DOL PREAMBLE TO PROPOSED RULEMAKING, UNIFORM ADMINISTRATIVE REQUIREMENTS FOR FEDERAL GRANTS AND COOPERATIVE AGREEMENTS TO GOVERNMENTS & NONGOVERNMENTAL ORGANIZATIONS, ETC.	10/21/88	2	JOHN MORRALL	FR ______ (NPRM) c. 10/30/88	18	11/07/88	11/30/91	2	✓ R

TOTAL FOR AGENCY: 8

3 new
4 rev
1 ext

43.25
avg 43 days

DEC

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1205-0055	09/19/88	4	BERNARD EYDT	ETA VALIDATION HANDBOOK, NO. 361, CHAPTER IV A	ETA HANDBOOK NO. 361 WORKLOAD VALIDATION CHAPT. IV A	74	12/01/88	09/30/91	2	
1205-0187	09/14/88	4.	BERNARD EYDT	INTERNAL FRAUD ACTIVITIES	ETA 9000	79	12/01/88	12/31/89	2	— ✓
1215-0005	09/21/88	3.	BERNARD EYDT	APPLICATION FOR SPECIAL INDUSTRIAL HOMEWORKER'S CERTIFICATE, APPLICATION FOR AUTHORIZATION TO EMPLOY A STUDENT-LEARNER AT SUBMINIMUM WAGES, & APPLICATION FOR SPECIAL WORKERS, ETC.	WH-2, 205 222-MIS, 226-MIS 227A-MIS	72	12/01/88	12/31/89	2	— ✓
1215-0013	11/14/88	3	JAMES C. MASON	29 CFR PARTS 516 AND 530 - EMPLOYMENT OF HOMEOWNERS IN CERTAIN INDUSTRIES, RECORDS TO BE KEPT BY EMPLOYERS	WH-75 WH-46	29	12/12/88	12/31/91	2	R
1215-0024	10/21/88	5.	JAMES C. MASON	NOTICE OF FINAL PAYMENT OR SUSPENSION OF COMPENSATION PAYMENTS	LS-208	61	12/20/88	12/31/91	2	
1215-0028	09/12/88	5	JAMES C. MASON	WH-1: ECONOMICS SURVEY SCHEDULE WH-1 INST.: INSTRUCTIONS FOR COMPLETING WH-1	WH-1 WH-1 INST.	81	12/01/88	10/31/88	④	✓ Dis + Cont
1215-0072	10/12/88	3	JAMES C. MASON	OFCCP RECORDKEEPING/REPORTING: SUPPLY AND SERVICE AAP-CORPORATE SELECTION DECISIONS		62	12/12/88	06/30/89	2	R
1215-0170	10/26/88	2.	BERNARD EYDT	APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988-29 CFR PART 801	-	59	12/23/88	12/31/91	2	R
28 1218-0011	12/06/88	5	SCOTT H. JACOBS	DESIGNATION OF COMPETENT PERSON - LOG OF INSPECTIONS AND TESTS BY COMPETENT PERSON	OSHA-73 & 74	2	12/08/88	12/31/88	R ㉑	[illegible] Sub m
25 1218-0116	10/18/88	5.	SCOTT H. JACOBS	CONSTRUCTION CRANE RATING CHART AND LIMITATION INSTRUCTIONS	OSHA-228	59	12/15/88	12/31/91	2	R
1219-0025	10/18/88	3	SCOTT H. JACOBS	APPLICATION FOR USE OF NONPERMISSIBLE EXPLOSIVES AND NONPERMISSIBLE SHOT-FIRING UNITS (30 CFR 75.1303-1 AND 77.1909-1)		71	12/26/88	12/31/91	2	R

2:30

DEC (CONT.)

X

THE DAILY ACTION LIST BY AGENCY
12/01/88 - 12/31/88

PAGE 17
01/04/89

SEE HEADER PAGE FOR EXPLANATION
OF REQUEST CLASS AND ACTION CODES

Department of Labor

OMB NUMBER	DATE RECEIVED IN OMB	REQUEST CLASS	REVIEWER	AGENCY FORM NUMBER(S)		ACTION DATE	EXPIRATION DATE	ACTION CODE
1219-0052	11/07/88	4	SCOTT H. JACOBS ESCAPEWAYS AND ESCAPE FACILITIES (30 CFR 75.1704-2)		36	12/12/88	09/30/89	2 R
1219-0105	09/21/88	2	SCOTT H. JACOBS SUBSTANCE ABUSE PROGRAMS IN THE MINING INDUSTRY		83	12/12/88	0	⑨ (M)
1219-0107	11/10/88	2	SCOTT H. JACOBS POSTING BURNING RATE OF SAFETY FUSE (30 CFR 56/57.6502)		47	12/26/88	09/30/90	2 R

TOTAL FOR AGENCY: 14

Avg. 58

49

ATTACHMENT B
OIRA Documents Demonstrating Forced Withdrawal of Paperwork

Memo to OIRA Desk Officer Jim Houser
OIRA Decision on Paperwork

December 12, 1989

NOTE FOR JIM HOUSER

THROUGH: Barry White BW

FROM: Bayla F. White BFW

SUBJECT: Application for Basic Grants under Library Services for Indian Tribes Program

I recommend that you try to get ED to withdraw this package. The package appears to be for grants using FY 1991 funds. The authorizing statute under which such awards would be made--the Library Services and Construction Act (LSCA)-- will have expired by the beginning of FY 1991.

Both the House and the Senate have passed bills reauthorizing the LSCA; conferees were appointed but no conference convened prior to the end of the first session of the 101st Congress. While retaining much of the structure of the current LSCA, the bills under consideration do make changes and additions to programs. The conference will certainly iron out differences and a reauthorized LSCA will be enacted next spring.

Until that happens, I do not see how we can approve this forms clearance package.

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

1850-0568

attachment

Beth Fine (202) 357-6323

ACTION DATE

TO:
PATRICK J. SHERRILL
DEPARTMENT OF EDUCATION
400 MARYLAND AVE., S.W. - RM. 5624, ROB 3
WASHINGTON, D.C. 20202
Office of Educational Research and Improvement

01/18/90

ON 11/21/89, YOU REQUESTED APPROVAL OF THE FOLLOWING INFORMATION COLLECTION:
TITLE: APPLICATION FOR BASIC GRANTS UNDER LIBRARY SERVICES FOR INDIAN TRIBES PROGRAM
AGENCY FORM NOS.: G50-3P

IN ACCORDANCE WITH THE PAPERWORK REDUCTION ACT, WE HAVE TAKEN THE FOLLOWING ACTION ON THIS INFORMATION COLLECTION:

NOT APPROVED, WITHDRAWN AT REQUEST OF AGENCY. SEE "REMARKS" BELOW.

EFFECT ON BURDEN:	RESPONSES	REPORTING HOURS
PREVIOUS STATUS	200	400
NEW STATUS	200	400
DIFFERENCE	0	0

REMARKS:

This information collection is withdrawn at the request of Pat Sherrill.

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET

OMB NO. 1850-0568

ABSTRACT:
'NATIVE AMERICAN EDUCATION, INDIAN RESERVATION, PUBLIC LIBRARIES'. THIS FORM WILL BE USED TO ENABLE INDIAN TRIBES AND HAWAIIAN NATIVES TO APPLY ANNUALLY FOR BASIC GRANTS AS AWARDED UNDER SECTION 403 OF THE LIBRARY SERVICES FOR INDIAN TRIBES PROGRAM, TITLE IV OF THE LIBRARY SERVICES AND CONSTRUCTION ACT, AS AMENDED.

ALLOWANCE LETTER: NO   FUNCTION: MULTIPLE FUNCTIONS
ON PLAN: NO   EXCEED BUDGET: NO
NO. OF FORMS: 1   USE: PUBLIC   3504(H): N/A
RESPONDENTS: 200   RESPONSES: 200   REQUEST: EXT/NO CHG
AFFECTED PUBLIC: STATE/LCL GOV   HOURS: 400
SMALL BUSINESS: NO   ACTIVITY TYPE: 999
PURPOSE: APPLICATION
FREQUENCY: ANNL
COLLECTION METHOD: MAIL S/A
RETENTION: COLLECTION AGENT: ROSTNG DPT/AGCY   CONFIDENTIALITY: NO
COMPULSORY STATUS: REQD FOR BEN
FEDERAL COST: PUBLIC COST:
REVIEWER: FEDERAL EDUCATION DATA ACQUISTION COUNCIL FEDAC

ACTION APPROVED BY:	AUTHORIZING OFFICIAL	TITLE: DEPUTY ADMINISTRATOR	DATE
	/S/JAMES B. MACRAE FOR	OFFICE OF INFORMATION AND REGULATORY AFFAIRS	01/18/90

```
                    PAPERWORK DOCKET WORKSHEET

OMB NO: 1850-0568              DATE RECD: 11/21/89      ACTION DATE: 1-18-90
REQUEST CLASS: EXT/NO CHANGE PENDING
AGENCY: Office of Educational Research and Improvement
DEPARTMENT: Department of Education
AGENCY FORM NO(S): G50-3P
OLD TITLE: APPLICATION FOR BASIC GRANTS UNDER LIBRARY SERVICES FOR
           INDIAN TRIBES PROGRAM

NEW TITLE: APPLICATION FOR BASIC GRANTS UNDER LIBRARY SERVICES FOR
           INDIAN TRIBES PROGRAM

ABSTRACT:
    *NATIVE AMERICAN EDUCATION, INDIAN RESERVATION, PUBLIC LIBRARIES*.
    THIS FORM WILL BE USED TO ENABLE INDIAN TRIBES AND HAWAIIAN NATIVES TO
    APPLY ANNUALLY FOR BASIC GRANTS AS AWARDED UNDER SECTION 403 OF THE
    LIBRARY SERVICES FOR INDIAN TRIBES PROGRAM, TITLE IV OF THE
    LIBRARY SERVICES AND CONSTRUCTION ACT, AS AMENDED.


FUNCTION: 999                  ALLOWANCE LETTER: NO     3504(H): N/A
ON PLAN: NO****                EXCEED BUDGET: NO        NO. OF FORMS:  1
AFFECTED PUBLIC: GOVERNMENT
USE: PUBLIC   SMALL BUSINESS: NO  SIC: 999
PURPOSE: APPLICATION
FREQUENCY: ANNUALLY
COLLECTION METHOD: MAIL SELF-ADMIN
RETENTION PERIOD:              COLLECTION AGENT: RQSTING AGCY
COMPULSORY STATUS: REQ FOR BEN
CONFIDENTIALITY: NO   FEDERAL COST: $0            PUBLIC COST:

RESPONDENTS: 200               RESPONSES: 200           HOURS: 400
REVIEWER: FEDERAL EDUCATION DATA ACQUISTION COUNCIL FEDAC
LAST ACTION: CORRECTION        DATE: 10/20/89       EXPIRATION DATE: 03/31/90

EXISTING TERMS OF CLEARANCE:
```

1/18

PAPERWORK DOCKET WORKSHEET CONTINUED PAGE 2

OMB NO: 1850-0568 THIS ACTION: Withdraw EXPIRATION DATE:

CLASSIFICATION OF CHANGES IN BURDEN

EFFECT ON BURDEN:	REPORT	RESPONSES	HOURS	PUBLIC COST
OLD STATUS:	1	200	400	$ 0
NEW STATUS:				
DIFFERENCE:				

EXPLANATION OF DIFFERENCE:				
(ADJUSTMENTS)				
CORRECTION-ERROR				
CORRECTION-REESTIMATE				
CHANGE IN USE				
(PROGRAM CHANGES)				
INCREASE				
DECREASE				

NEW TERMS OF CLEARANCE:

OMB NUMBER: 1850-0568 ACTION DATE: 00/00/00 TICKLER DATE:

TITLE: APPLICATION FOR BASIC GRANTS UNDER LIBRARY SERVICES FOR INDIAN TRIBES PROGRAM

REMARKS:

This information collection is withdrawn at the request of Pat Sherrill.

SUMMARY OF REVIEW:

CONSULTATIONS:

PERSON	AFFILIATION	PERSON	AFFILIATION
Bella Rhee	Education		
Pat Sherrill	Education	Bayla White	OMB

SIGNATURE(S) AND DATE(S):

DESK OFFICER ________ DATE 1/12/90 REVIEWER ________ DATE ______

AA ________ DATE 1/18/90

DA ________ DATE ______

GAO
United States
General Accounting Office
Washington, D.C. 20548

Program Evaluation and
Methodology Division

January 8, 1990

Mr. James B. MacRae, Jr.
Acting Administrator and
Deputy Administrator
Office of Information and
Regulatory Affairs
Office of Management and Budget

Dear Mr. MacRae:

In your letter of November 15, 1989, you expressed a number of concerns about our September 7 report on the Office of Management and Budget's execution of its paperwork review function, Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability (GAO/PEMD-89-20).

The present letter responds in detail to the major points that you have raised. As a preamble, however, I would note that our report reflects great efforts on our part to give OMB the benefit of the doubt whenever doubt was possible. If anything, then, the report probably understates the seriousness of the problems we found with the Office of Management and Budget's paperwork review process. Indeed, it was of considerable concern to us to find that 7 of 10 submissions disapproved on quality grounds by a distinguished panel of experts had been approved by OMB. This result confirms to us the existence of technical weaknesses at OMB that are consistent with the limited technical expertise we found among staff, the uncertain match between the prior training of desk officers and the technical judgments they had to make, the lack of on-the-job technical training and direction for desk officers at OMB, and the procedural rather than substantive emphasis of the OMB information collection review handbook. I believe these problems impede the capacity of OMB to carry out an important function assigned to it by the Congress, and I hope that you will be taking steps to correct them. After all, the weaknesses we found--such as the approval of collections which ignore opportunities for statistical sampling, or collections with the potential for serious response bias and no checks on that bias--constitute serious errors in information collection review that need to be addressed, we believe, on a priority basis. OMB, in fact, has approved data collections with technical flaws of such dimensions that they are both unnecessarily costly and could render the information collected useless or seriously misleading.

In your letter, you question these findings by characterizing our methodology as based primarily "on the subjective views of the 17 agency staff interviewed." This ignores our use of a multiple-method approach which addressed each study question using a variety of independent sources of information. Data from your organization's administrative database or from our technical reviews of selected information collection requests were not considered in isolation, but were combined with each other and with the results of our interviews with officials from OMB and from other agencies. For instance, our recommendation for augmentation of the technical capabilities of the Office of Information and Regulatory Affairs reflects not only the results of our technical review of 17 submissions, which showed (as already noted) that OMB approved seven technically inadequate submissions, but also responses to our interviews with agency officials, our review of data on desk officer backgrounds provided by OMB (revealing the limited nature of their technical training prior to employment at OMB), and our interviews with desk officers indicating that they received little formal training while at OMB.

With regard to specific points raised in your letter, we would note, first of all, that our report does not compare "research-oriented submissions" with "statistical or regulatory requests." Such a comparison would not be appropriate because we use the term research-oriented submissions broadly to include statistical and evaluation requests as well as research requests per se. You have apparently confounded the type of data collection request with the type of agency.

You further criticize our report for focusing on the decline in research submissions from regulatory agencies with low approval rates. You find other increases from other types of agencies to compensate for the decrease in research requests from those agencies. That misses the point. The "chilling effect" on research which we infer from your data is the impact of OMB review on submissions by agencies which have had adverse experiences with OMB. Increases in collections by other agencies with high approval rates are neither relevant to our finding of a chilling effect, nor do they refute it.

You suggest in your letter (bottom of page 2) that a reduction in the number of information collection requests submitted is an appropriate and desirable response by agencies with low approval rates. But needs for data are not limited to agencies with high approval rates. Agencies with low approval rates may need to improve their collection design and planning functions, and may require additional guidance from OMB, but the outcome to be desired here is better submissions, not a reduction in the number of submissions.

You also note that the need for new or one-time collections is concentrated in the first years of a new Administration. While this assumption may or may not be true, it seems equally plausible that the need for new collections is continuous, depending on the new issues and concerns that emerge and become critical over time.

You raise a concern (bottom of page 3) that if the number of new data collections did not decline over time, paperwork would expand "beyond all bounds." This assumes that new collections are permanent and are in addition to existing collections. But new research-oriented collections will often be "one-time," or be designed to collect data over some limited period, rather than adding to the permanent paperwork inventory. Further, new collections which are intended to be permanent may replace existing collections rather than being additional to them. In fact, OMB's own information collection budget data show that more paperwork reduction took place in 1982-84 than in 1985-87, even though more new collections were submitted in 1982-84.

Your feeling is (middle of page 4) that our division of agencies into those with "low" and "high" approval rates is arbitrary, and you suggest there is little difference between an agency with an 89 percent approval rate and one with a 90 percent approval rate. This, of course, is a fact of life--any dividing line used for separating high and low categories can always be called arbitrary--yet an imperative of categorical analysis involves just such divisions. When the task is--as ours was--to categorize agencies based on a continuous variable, some agencies will be just above or below the dividing line no matter what dividing line is used or how it is selected.

Your letter argues (bottom of page 4) that there would have been no difference between the low approval rate agencies and high approval rate agencies in our sample if the former had submitted 88 more requests. But in fact they did not, and therefore there was a difference. Further, the comparison you make between these 88 hypothetical submissions and the actual increase of 113 submissions by "other" agencies is not appropriate for two reasons. First, the 113 submissions you cite represent a subset of the 20,000 submissions made by all agencies in the 6-year period, while the hypothetical 88 submissions refer to submissions by our sample of 50 agencies in the same period. Second, the additional 113 submissions come from 73 agencies that we excluded from our analyses because they made very few submissions, so that it would be inappropriate to characterize them as either high approval rate or low approval rate agencies. Put another way, these 73 agencies are not relevant to the comparison we were making between agencies which had a favorable experience with OMB and those which had less favorable experience.

You argue that the outcome of OMB's reviews reflect factors other than technical quality. This may explain disapprovals of collections which were technically adequate, but it does not explain approval of submissions which were technically inadequate.

You suggest that because technical issues "enter directly into the determination of utility and appropriate burden," OMB need not make any reference, in the justification which it offers for a disapproval, of any technical issues which underlie OMB's decision. However, OMB's use of such vague language as "lacks practical utility" to justify many disapprovals is uninformative, does not help an agency improve its performance, and fails to provide appropriate documentation of OMB's decision rationale for the public or the affected agency.

You make the point that some of our data collection does not support generalization and this is quite correct. Indeed, we carefully explain in our report that some of our analyses support generalization and some do not. This is a part of the multi-method approach mentioned earlier, in which the weaknesses of some methods are compensated for by the strengths of others. The crucial issue here is that we have not, anywhere in our report, generalized based on data that do not support generalization.

Finally, despite your impression, our report does not address the qualifications of the staff of OMB's Office of Statistical Policy. On the contrary, we indicated that these technical experts appear to have too little input to OMB reviews. Greater use of technical consultants, more training for desk officers, and more hiring of technically trained persons as desk officers would all help improve the quality of OMB's review of data collection requests. Both interview data and the outcomes of our technical reviews support these conclusions.

In summary, we believe that serious problems exist in the technical adequacy of OMB's reviews and that all of these problems are resolvable if they are addressed responsibly. We hope you will take the necessary steps to do this and we stand ready to help in any way we can.

Sincerely yours,

Eleanor Chelimsky

Eleanor Chelimsky
Assistant Comptroller General

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MAR 20 1990

Honorable John Glenn
Chairman,
Committee on Governmental Affairs
Washington, D.C. 20510-6250

Dear Mr. Chairman:

After the Senate Governmental Affairs Committee February 21, 1990, hearing on the Federal Information Resources Management Act of 1989, S. 1742, you sent me questions to which Senator Warren Rudman requested answers.

I am pleased to respond to these questions, and would welcome the opportunity to discuss these or any other matters of interest to you.

Sincerely,

James B. MacRae, Jr.

James B. MacRae, Jr.
Acting Administrator
and Deputy Administrator
Office of Information
and Regulatory Affairs

Enclosure

cc: Senator Warren Rudman

Senator Warren Rudman's
Questions for James B. MacRae, Jr.
Acting Administrator and Deputy Administrator,
Office of Information and Regulatory Affairs
February 21, 1990

Question (1): Your statement indicates you support a four-year authorization of OIRA. How do you arrive at that length of time?

Answer: S. 1742 would establish a "Commission on Federal Information" to consider issues relating to the substance and implementation of the Paperwork Reduction Act. S. 1742 also provides that the Commission would issue its final report "no later than July 1, 1991," three months before the authorization for appropriations provided in S. 1742 would expire. Similarly, S. 1742 would provide that the General Accounting Office would report to this Committee "on the overall effectiveness and attentiveness of the Office of Information and Regulatory Affairs (OIRA) and the agencies in meeting all of the responsibilities assigned by law," including the extensive amendments to be made to the Paperwork Reduction Act by S. 1742.

This pattern of reporting dates suggests that S. 1742 envisages that the Congress would evaluate the Commission and GAO reports as part of the Congressional decision concerning whether, and in what way, to further authorize appropriations for OIRA. However, the timing for Commission and GAO reports and any resulting Congressional action is much too compressed. It is highly unlikely that, by July 1991, the Commission will have been established, its work completed, and a GAO report finished. In any event, by July 1 of 1991, the responsible Congressional Committees--following traditional patterns for enacting legislation--would have moved substantially forward in crafting, and even reporting out new legislation. Thus, the currently proposed schedule does not allow enough time realistically for the Congressional plan to be carried out.

The "Commission on Federal Information" is modeled, in large part, on the 1974 Commission on Federal Paperwork--a Commission that took three years from enactment to complete issuing its reports and recommendations. The previous Commission's reports were issued in 1977; It took three years after that commission issued its final reports for Congress to act on that Commission's recommendations, and to enact the Paperwork Reduction Act of 1980. I am not suggesting that this whole process needs to take six years, but experience suggests that three years is a reasonable amount of time for a new Commission to carry out a serious assignment, and one year probably the minimum reasonable time necessary for agencies and the Congress to respond carefully to serious recommendations.

As Director Darman stated in his February 20, 1990, letter to you we strongly recommend that the Commission life of no less than 18 months be extended to three years "in order to permit an orderly appropriation of funding, appointment of the Commissioners, hiring of staff, and adequate consideration of the many complex and interrated issues involved." Extending OIRA's reauthorization to four years--from FY 1991 through and including FY 1994 "would then allow the Congress, in the context of the next reauthorization, to consider in an orderly way the Commission's recommendation."

Once enacted, S. 1742 would require OIRA and the agencies to initiate a number of activities and specific projects, some very quickly, some within a year of enactment. To have GAO issue a report evaluating these activities before they are begun, or at the same time as they are first being implemented, is simply wasteful effort and not likely to result in useful evaluation. There would be no "track record" for GAO to evaluate. For that reason, OIRA's reauthorization for appropriations should extend at least a year longer than the conclusion of the GAO report; Congress would then have time fairly and thoroughly to evaluate whatever comments GAO made, and OMB's and agencies' responses, and thereafter decide what, if any, legislative changes were needed in the Paperwork Reduction Act.

I also note that S. 1742 authorizes appropriations for OIRA for FY 1990 and FY 1991. Appropriations have already been provided for FY 1990. In effect, therefore, S. 1742 now provides authorization for appropriations for only one year. We support a four-year authorization of appropriations for OIRA, and recommend that this start with FY 1991 and extend through and including FY 1994.

Question (2): As you know, the bill before the Committee makes several additions to current law with respect to the functions of OIRA, especially regarding information dissemination and management. Do you believe the proposed funding authorization level is adequate to properly carry out these activities? If not, what do you recommend?

Answer: It is important to stress that the Paperwork Reduction Act directs agencies to manage carefully and efficiently their collection, use, and sharing of information; OMB's role is to ensure that agencies comply with these statutory responsibilities.

As I stated at the hearing, I think that we have been able to carry out OIRA's oversight responsibilities adequately, in conjunction with the support we receive from the agencies. The proposed funding authorization level for OIRA is adequate to carry out OIRA's responsibilities set forth in the bill.

Carrying out the information dissemination and management duties set forth in S. 1742 will require considerable effort by other agencies. Carrying out OIRA's expanded oversight responsibilities will require considerable assistance from other agencies, but we find that such a participative model works well.

Question (3): You have stated your opposition to the provisions in S. 1742 regarding the disclosure of communications between OIRA and executive agencies. OIRA already operates under guidelines for disclosure as the result of a 1986 agreement, does it not?

Answer: Yes. Then-OIRA Administrator Wendy Gramm implemented a June 13, 1986, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498 entitled "Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12291 and 12498 [Revised]." OIRA has adhered to this memorandum ever since, and publishes it each year in the Regulatory Program of the United States Government to inform the public of that fact.

-- **To your knowledge, have you or others encountered any problems with these procedures? Would you recommend changes to them?**

  Answer: OIRA has complied with the 1986 Gramm memorandum. We are unaware of evidence of problems related to compliance with the procedures set forth in the Gramm memorandum.

-- **I understand the Administration opposes the codification of these procedures. If perceived problems exist, in lieu of codification, are you willing to reopen discussions of these guidelines to seek improvements?**

  Answer: Yes.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

February 20, 1989

Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510-6250

Dear Mr. Chairman:

Thank you for your letter requesting OMB to testify on S. 1742, the "Federal Information Resources Management Act of 1989." As you know, Jim MacRae, our Acting Administrator of the Office of Information and Regulatory Affairs (OIRA), will be testifying before you tomorrow. Nonetheless, I wanted to respond personally to your letter before the hearing.

S. 1742 appropriately recognizes the increasing importance of information as a Federal resource and the need for increased attention to management. Its provisions relating to information dissemination, privacy, and security highlight areas where a special focus is required. We need to do more in this area, and S. 1742 contains a number of very useful provisions in this regard.

However, I must call your attention to the fact that S. 1742 poses certain fundamental problems which, if not satisfactorily addressed, would engender a veto recommendation by the President's senior advisors. The most serious of these include:

1) Section 3518 and 3506(d) would require that OIRA maintain a "public file" of all written communications regarding any OIRA review while deliberations with the agency were occurring and regardless of whether the communications were deliberative or pre-decisional. These provisions would cover OIRA's budgetary, legislative and program oversight support of OMB generally as well as its procurement, telecommunications, and information technology functions. The provisions would also place greater constraints on the Executive Office of the President than on the agencies that report to the President. The equivalent for Members of Congress would be a statutorily required public file on the substance of all communications Members have with constituents. The provisions are also contrary to the principles that have worked fairly well in connection with the Administrative Procedures Act

and the Freedom of Information Act. The Department of Justice believes these provisions would violate the President's Constitutional authority over agency rulemaking.

2) S. 1742's delegation of authorities exclusively to the Administrator and its separation of OIRA's budget from the rest of OMB needlessly fragment, in our view, an already small OMB. Unlike the Office of Federal Procurement Policy (OFPP), OIRA has the task of coordinating the efforts of all other parts of OMB in the areas of paperwork reduction, information technology, regulatory review, and as S. 1742 would appropriately initiate, the development of information policy. Separating OIRA from the rest of OMB would make management of these issues impossible and eliminate OIRA's ability to ensure integrated review in each of these areas.

In addition, Section 3507 virtually eliminates "independent review" of ongoing information collections that generate paperwork as envisaged in President Carter's 1979 Executive Order 12174 -- a task that Congress viewed in 1980 as essential. This Section would do this by adopting new and burdensome review procedures and by requiring OIRA to approve existing collections contained in a rule unless OIRA finds the collection activity "arbitrary and capricious." This new standard would make it essentially impossible for OIRA to review substantively existing collections. We also have a number of additional concerns that are set out in the more detailed enclosure to this letter.

We look forward to working with you and your staff, as we have on the EPA legislation. We need to find ways to assure continuing efforts to reduce unneeded paperwork, consistent with the President's Constitutional responsibility to provide direction to the Executive Branch, while at the same time providing reasonable safeguards.

With best regards,

Dick Darman

Richard G. Darman
Director

Enclosure

DETAILED COMMENTS BY THE OFFICE OF MANAGEMENT AND BUDGET ON S. 1742.

The Need to Collect Information at a Minimum Cost to the Government. New Sec. 3501 would delete existing purpose (2) from the Paperwork Reduction Act. We recommend that the Committee retain as a statement of purpose, the need "to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information." Information is a commodity with social and economic value. Federal agencies collect information to serve agency needs and, after validation, collating, and processing, to serve the needs of private users. But the benefits of information are only one side of the issue. The collection of Federal information imposes costs not only on the respondents, but also on Federal agencies.

New Sec. 3501 includes, in purpose (1), "public benefit" (a combination of agency need and private use and benefit), and, in purpose (2), respondent "burden." New Sec. 3501 would omit any concern for agency cost. In reviewing a draft agency information collection, OMB needs to balance the full range of competing concerns--agency need and costs, user need, and respondent burdens--in order to assure cost-effective and efficient development and utilization of data. To complete the equation--and, in particular, in this time of such tight fiscal constraints--Congress should not delete as a public concern a purpose that has been in the Act since 1942.

Federalism. Given the emphasis in S. 1742 on dissemination--the sharing of information among users--and the active role of State and local government in collecting and providing information, we also recommend the Committee consider adding another new purpose, namely:

> "strengthen the partnership between the Federal Government and State and local governments in the collection and sharing of government information."

Definition of "Burden". We support the addition to the definition of "burden" in new Sec. 3502(4) (page 6, lines 18-25). We recommend adding "or for" after "to provide information to" in that same definition. Under the Paperwork Reduction Act, respondents do not necessarily physically deliver information to the Federal Government. Instead, as recognized in the administration of this paperwork oversight program since 1942, respondents may maintain records for possible inspection by Federal, State or local government officials, and by members of the public, or may provide information to contractors, State or local governments, or even just disclose it to the general public. The burden of all these types of recordkeeping and reporting are evaluated by OMB as part of its paperwork clearance procedures (5 CFR 1320.4(c), and 5 CFR 1320.7(b) and (c)).

Definition of "Information Systems". We recommend the Committee reevaluate the definition of "information systems" in Sec. 3502(16) (page 8, lines 12-21).

Sec. 3502(16)(A) would use the phrase "collection of information" (page 8, line 13) to describe databases generally, including those containing information not gathered from the public. This phrase, however, is already defined in the Act (existing Sec. 3502(4)) as information gathered from the public. We recommend the Committee substitute for "collection of information" the expression "body of information."

Sec. 3502(16)(B) would include the "personnel" to obtain, maintain, use, and disseminate information. Inclusion of "personnel" who "use" information broadens the concept of information system to be virtually coextensive with the program served by the information system. In computing an information system's life cycle costs, for example, one should include the personnel costs for developing software and operating the information technology, but one does not normally include the ongoing personnel costs for using the information system. For example, application of this definition to the National Weather Service (NWS) makes it impossible to distinguish the NWS information systems from the National Weather Service itself.

Professional Qualities of OIRA Administrator. Sec. 3503(c) (page 10, lines 7-14) would require the President to appoint an OIRA Administrator "with special attention to professional qualifications and credentials" related to the "functions" of OIRA "described under this chapter." As a practical matter, the President would follow principles such as these regardless of the statute involved. Nevertheless, we recommend deletion of such statutory qualifications as these on the principle that this is an attempt by Congress to inject itself into the nominating process, which is constitutionally delegated to the President alone. Public Citizen v. United States Department of Justice, 109 S. Ct. 2558, 2581 (1989) (Kennedy, J., concurring).

Budgetary Line Item and Shifting Statutory Responsibilities from OMB Director to OIRA Administrator. Sec. 3503(b) (page 10), Sec. 3504(a) (page 11), and many "technical" changes throughout the Act (pages 49-54) would make the OIRA Administrator, not the OMB Director (as now), legally responsible for implementing the Paperwork Reduction Act. Sec. 3503(d) (page 10, lines 15-20) would include OIRA "as a separate line item within the budget" of OMB, and effectively require that OIRA work on no OMB matters other than those specifically authorized under the Act. We strongly recommend that the Committee delete these provisions.

As a matter of policy, such a separation of OIRA could fragment an already small OMB. OIRA serves as one oversight arm in the Executive Office of the President, and, as such, works closely with other OMB staff. Separating OIRA's budget from the rest of OMB is inconsistent with OIRA's role. Such a separation could weaken OIRA, resulting in less effective performance by OIRA in carrying out its mandated responsibilities for budgetary, testimony, and legislative review, which are not different in kind from its regulatory and paperwork reviews. This provision could also deny the OMB Director the ability to assign new duties to OIRA in support of other OMB missions.

Sec. 3503 would have the OMB Director "be responsible and accountable for all ... activities, and expenditures" under this Act and obligated to "ensure coordination of the provisions of this chapter with other functions" at OMB. However, Sec. 3504(a)(1) (page 11, lines 1-3) authorizes the OIRA Administrator "to administer all functions under this chapter" and Sec. 3504(a)(2) instructs the OIRA Administrator to "develop and implement" the various functions set forth in the Act. The Administrator would become specifically responsible for issuing rules under the Act, and, ultimately, for overseeing agency compliance with the Act. Such fragmentation of OMB's authority could, in practical terms, dilute the direct, public, paperwork oversight role of the OMB Director, thereby unnecessarily weakening OIRA's ability to carry out its Paperwork Reduction Act oversight responsibilities.

Emphasizing Reduction of Burden for Procurement and Grant Programs. The changes to Sec. 3504(c)(5) (page 12, line 22, to page 13, line 2) would delete the "setting [of] goals for reduction of [paperwork] burdens", and substitute "promoting the Reduction of burden" with emphasis on "those persons most heavily burdened." Similarly, new Sec. 3505(3) (page 19, line 21, to page 20, line 2) would have OIRA identify initiatives to reduce paperwork burden "associated with Federal procurement and grant programs." Those persons who are actually "most heavily burdened" by Federal information collections are, in general, the taxpayers, and those who are regulated. H.R. 3695 would add "particular emphasis on Federal taxation" (page 8, line 2). We recommend the Committee add a target area, "American international competitiveness."

"Timely Release of Statistical Data to the Public". The Paperwork Reduction Act directs agencies to manage carefully and efficiently their collection, use, and sharing of information; OMB assures that agencies comply with these statutory responsibilities. Inconsistent with this, S. 1742 directs OMB to have agencies accomplish certain missions that the Act does not give to agencies.

For example, Sec. 3504(d)(1)(H) (page 14, lines 16-17) would have OIRA promote the timely release of statistical data to the public." While we have no objection to this goal generally, we recommend the bill be amended to make this a responsibility of the agencies in Sec. 3506. OMB oversees what agencies otherwise have a mission to accomplish legislatively; OMB oversight under the Paperwork Reduction Act should not and can not, on its own, effectively create an agency mission.

Oversight of Personal Information Systems. The changes to Sec. 3504(f) (pages 15-16) stress the need for OMB oversight of new agency information systems containing personal information. Sec. 3504(f)(5) (page 16, lines 1-4) is misplaced and we recommend it be moved to Sec. 3514, to allow OIRA to report periodically to Congress on "agency compliance" with the Privacy Act in its annual report (see Sec. 3514).

Legislative Recommendations. The requirement in Sec. 3504(f)(6) (page 16, lines 5-8) that OIRA develop legislative proposals to remove inconsistencies in "laws and practices involving privacy, confidentiality, and disclosure of personal information" would more appropriately be phrased as a Committee request in the legislative history. We do not object to considering the need for such legislative proposals, but do not think it appropriate in legislation to direct the President or his subordinate to make legislative recommendations.[1]

Addition of Information Dissemination Function. As a general matter, we have no objection to new Sec. 3504(h) (pages 16-19) concerning "information dissemination functions." We would point out that the inclusion of Sec. 3504(h)(2) (page 17, lines 3-12) is misplaced; agency responsibilities should be set forth in Sec. 3506.

Also having the National Institute of Standards and Technology (NIST) issue standards contradicts the existing Brooks Act practice under which the Secretary of Commerce issues the standards. We are unaware of problems with this administrative arrangement, and recommend that the reference in this provision to NIST be changed to the Secretary of Commerce.

Chief Information Resources Management Official. Changes to Sec. 3506(b) would create a "Chief Information Resources Management Official" (page 20, line 16, to page 21, line 14), reporting to the senior official, who would be a career appointee in the competitive service. This new official is to "assist in agency information needs assessments and in the deployment of appropriate technological tools ... that is critical to successful accomplishment of program goals and agency mission" (page 21, lines 3-8).

This provision could create administrative confusion in a number of agencies, micromanaging the career status, rather than the statutory responsibilities of, the newly titled "official." The Committee would better accomplish its goals, and provide better management guidance to agencies, if the bill set forth agency responsibilities and left agency personnel structure to the agencies. We recommend this provision be amended to define the role of an office to be created by the head of the agency (compare Sec. 3506(e), page 26, lines 1-13), which office would be headed by the existing single official established by existing Sec. 3506(b).

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[1] For the same reason, we would suggest that proposed Sec. 3514(c)(1)(C) be deleted.

Systematic Inventory of Agency's Information Resources. Provisions in proposed Sec. 3506(c)(4) (page 22, line 22 to page 23, line 4) for maintenance of files open for public inspection may pose problems in the areas of security and privacy. For instance, this provision requires a systematic inventory and the maintenance of current records of an agency's information resources, including the agency's information-skilled personnel "for use in developing and updating the agency's information resources management plans and for informing relevant public outside the agency" (page 23, lines 1-4). In the intelligence and law enforcement communities, the identification of employees who have access to sensitive or classified information may place these employees at risk.

Agency Internal Review of Information Collections. New Sec. 3506(e) and (f) (page 26, line 1, to page 27, line 15) would strengthen agency paperwork reviews, and could serve as the basis for increased delegation of OMB's paperwork clearance functions. As a general matter, we support these provisions.

As a technical and clarifying suggestion, we recommend insertion of "agency" before "authority" in Sec. 3506(e)(3) (page 26, line 11). We also recommend this Committee substitute for the "not unduly burdensome" standard in Sec. 3506(f)(1)(A) (page 26, lines 19-20), the more stringent "least burdensome necessary" standard agencies now comply with in submitting information collections for OMB review (5 CFR 1320.4(b)(1)).

Sec. 3506(f)(2)(A) (page 27, lines 8-11) requires that the agency certify that it has taken necessary steps "to give notice to and consult with interested agencies and members of the public in order to enhance the clarity of [the] collection and to minimize its burden on respondents." It is important that agencies retain the flexibility to implement that provision in ways consistent with the Administrative Procedure Act and their divergent program responsibilities. For example, prior notice and consultations with the "interested" public in the context of information collections related to law enforcement actions might alert violators of the Government's intentions and defeat the purpose of the collection. With respect to information collections contained in nonnotice regulations issued, e.g., by the Department of the Treasury, this process would also be inconsistent with the Administrative Procedure Act.

The "Benefit" of an Information Collection. A change to Sec. 3507(a) (page 28, lines 1-2) would add "benefit" to the public notice. We recommend deletion of this change. This word is functionally duplicative with "need for", which is already in the notice, because agencies in explaining the "need for" information will necessarily explain the "benefit" to the agency and private users to be obtained from receiving that information. On the other hand, "benefit" could be just an amalgam of the concepts embedded in the existing terms "proper performance of the functions of the agency" and "practical utility." Thus, the use of the word "benefit" could fragment the concept of "utility" in a confusing way, without adding to conceptual clarity.

Thirty-Day Notice of OMB Information Collection Review. A change to Sec. 3507(a) (page 28, lines 3-10) appears to require an agency to give the public 30-day Federal Register notice before submitting a clearance package to OMB. Another change to subsection (a) (page 28, lines 14-19) appears to require 30-day notice after submission of the clearance package to OMB. A change to subsection (b) (page 28, lines 21-24) requires OMB to wait for 30-days until after the 30-day public comment is concluded. Lines 3-10 on page 28 are basically duplicative, and should be deleted. In addition, we recommend this provision be amended to make it clear that in cases of a health, safety, or other emergency or in the public interest (see existing 3507(g)), neither the agency nor OMB should have to wait 30 days. To the extent these notice provisions would apply to nonnotice regulations, these notice provisions would also be inconsistent with the Administrative Procedure Act.

Publishing an Explanation of OIRA's Paperwork Reduction Act Disapproval or Substantial Modification. We recommend the Committee amend the addition to Sec. 3507(b) (page 29, lines 1-7) that would require OMB to publish in the Federal Register "an explanation of any disapproval or modification of a substantive or material nature" for "any information collection activity reviewed by OIRA." Specifically, we recommend the Committee retain the existing requirement in 44 U.S.C. 3507(b). Publication in the Federal Register would be very time-consuming and costly, with little concomitant benefit. We are unaware of complaints concerning public access to OIRA's existing public files; we understand the concerns to be more with the adequacy of the explanation of what OIRA does, and have already taken steps to provide fuller explanations.

Limiting Three-Year Maximum Approval Period. We strongly recommend that the changes to Sec. 3507(d)(1) that would limit the three-year maximum approval period to information collections NOT "required by a rule" (page 29, lines 11-13) be deleted.

The current provision in the Paperwork Reduction Act is vital to full and meaningful public participation in the Federal paperwork review process. The three-year limit to paperwork approval, combined with the notice provisions in the Act, gives the public the opportunity to comment on any collection of information (including any recordkeeping requirement) contained in a current rule every three years, not just prior to the issuance of the rule. Many times, it is difficult to know in advance of implementation precisely what the burdens will be, or how useful the information will be. Section 89 of the Internal Revenue Code, intended to encourage nondiscrimination in employee benefit plans, is a good example of a statute that seemed meritorious until it began to be implemented, at which time the full adverse impact of the statutory paperwork burden became apparent. To avoid relying solely on predictions of utility and burden, OMB often approves information collections contained in rules with the condition that, after a period of time (such as one year), the agency evaluate the respondent burden and practical utility of the information collected, and propose any necessary changes.

Often, members of the public are not even aware of a paperwork requirement until it has been promulgated, and are not able to assess its impact until they begin to respond. Our experience with thousands of information collections and public comments has clearly demonstrated the need for reassessment of the burden and utility of an information collection after it takes effect. Through this iterative review process, the agency is also able on a continuing basis to improve the quality of information collected and reduce the burden of its collection of information.

We also believe that eliminating the three-year approval time limit would be a retreat from the basic purpose of the Paperwork Reduction Act, as well as make it difficult to implement certain other amendments contained in S. 1742. Almost all of the paperwork burden imposed on the American people each year is required by existing rules. New Sec. 3505(3) (page 19, line 21, to page 20, line 2) would direct OMB to identify initiatives to reduce "the burden of the Federal collection of information ... particularly with respect to the burden associated with Federal procurement and grant programs." H.R. 3695 (page 8, line 2) adds an emphasis on reducing "unnecessary burden" associated with "Federal taxation." Yet, these areas of Federal information collection, and the respondent burdens associated with them, are based largely on existing Federal regulation. Unless an agency has to justify the need for and burden imposed by these reporting requirements every three years to the public and OMB, the agency has considerable incentive to change nothing, and OMB will have little opportunity to bring about the burden reductions called for in S. 1742.

Agency Self-Certification Process. S. 1742 would amend Sec. 3507 to include provisions under which each agency would review the need for and practical utility of an existing collection of information, and justify the ongoing burden on respondents for continuing it.

The agency would then certify to OMB that it had carried out this three-year review and rejustification. OMB would review the agency's certification, and--unless OMB disagreed with the agency's conclusion or the agency failed to comply with the substantive standards in the Paperwork Reduction Act--would automatically extend approval for three additional years. We support the idea of a self-certification process, but, as proposed in this bill, it would not be an effective alternative to the current process of centralized OMB review every three years. In fact, this proposal would render ineffective any review of ongoing information collections outside of the sponsoring agency itself.

Agency review and self-certification explicitly place responsibility and accountability for periodic reassessment upon the agency, and thereby should improve the evaluation of previously-approved information collections. Yet we should not forget why the Paperwork Reduction Act gave authority to a central reviewer outside of the agency; agencies have strong incentives to leave in place existing information collection requirements, and for a variety of reasons are often reluctant to initiate needed improvements. The Congress believed in 1942, and affirmed in 1980 and 1986 that Federal paperwork would be reduced only if a central reviewer, outside the institutional interests of the agency collecting the information, were empowered to reach an informed, independent judgment, and to enforce that judgment. The proposal under discussion here would eliminate, for all practical purposes, the independent reviewer.

Since 1942, OMB has had the ability to withdraw an existing approval--to disapprove in part or in whole an already approved information collection. While OMB has rarely, on its own initiative, withdrawn an existing approval, occasions have arisen, as a result of new information or comments from the public, when OMB did so. The public has taken advantage of the public notice of the review of an ongoing data collection to point out problems or suggest less burdensome alternatives, and the agency and OMB have responded to those public comments. Agencies, even with the best of intentions, do not always effectively and objectively assess critical comments or suggestions for change of their own programs. The ability of OMB to withdraw an existing approval at any time has served as an essential check on agency reluctance to change.

Given these concerns, we have the following recommendations concerning the amendments to Sec. 3507(d) and new Sec. 3507(j). In general, S. 1742 should contain only one procedure for agency self-certification that applies to all information collections, and this procedure should not weaken OMB's ability to carry out its own review as circumstances warrant. We strongly recommend that the Committee delete "before issuance of the control number" from Sec. 3507(d)(4) (page 30, lines 23-24). Otherwise, this provision could limit OMB's ability to withdraw a three-year reapproval if the public complaints or other circumstances warrant. In addition, we strongly recommend deletion of "stating the reasons therefore," from Sec. 3507(d)(4) (page 30, lines 24-25). This would hinder expeditious review by requiring an irrelevant prereview justification for action. In addition, it would invade the interagency deliberative process.

Similarly, we recommend the Committee add "up to" before "three" in Sec. 3507(d)(2)(C) (page 30, line 12). An agency's need for data or the burden imposed by a particular information collection may not justify continuation for an additional three years. Legislative or other program changes may occur prior to that date, evaluations may be underway, members of the public may request a shorter time period in order to prepare their comments, or the agency may no longer need to collect that data for so long a time period.

In addition, in order to retain existing OMB authority related to review of information collections in current regulations (cf. 5 CFR 1320.14), the word "request" should be changed to the word "require" in Sec. 3507(d)(4) (page 30, line 25).[2]

We also strongly recommend that new Sec. 3507(j) (page 33, line 13, to page 36, line 9) be deleted. Despite the general agreement within Congress and the Administration that the agencies and OMB need to do more to reduce unjustified paperwork burdens on the American public, this provision would virtually eliminate the "independent review" of ongoing paperwork that Congress viewed, in 1980, as essential to reducing unjustified paperwork burden.

Both in 1980 and in 1986, Congress stressed the importance of reducing the burden of the Federal paperwork inventory by defined percentages. Likewise, S. 1742 would direct OIRA to target a five percent burden reduction from existing information collections, particularly from the burdens imposed by "Federal procurement and grant programs." But the most burdensome information collections tend to be ongoing. Inconsistent with these congressional concerns, S. 1742 would weaken OIRA's management oversight authority to oversee agency reevaluation of the need and burden of ongoing collections of information.

President Carter's Executive Order No. 12174 (November 30, 1979) established a sunset review at OMB for both new and ongoing information requirements, a principle codified in the Paperwork Reduction Act of 1980. S. 1742 would undermine this long-established independent sunset review. While the bill stresses the need to share and disseminate information, it seems anomalous for it to limit effective Executive oversight to improve the quality and reduce the burden of that same information.

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[2] Also, as a technical matter, we point out that the certification required "no later than 60 days before expiration date" in new Sec. 3507(d)(2)(B) (page 29, line 24), but "during the 60 day period" in new Sec. 3507(d)(2)(D) (page 30, line 14) appears inconsistent. We recommend the word "during" (page 30, line 14) be changed to "prior to". We also suggest that the reference to Sec. 3506(a) in Sec. 3507(d)(2)(B)(ii) (page 30, line 8) should be changed to refer to Sec. 3506(f).

More specifically, this new subsection incorporates a variation of the three-year, agency-certification process for information collections "required by rule". First, there is no logical basis to have two different agency certification procedures. New Sec. 3507(d) would apply equally well to information collections contained or not contained in rules.[3] Second, new Sec. 3507(j) gives OMB authority to disapprove an ongoing, unchanged information collection only when an agency "decision on continuing the collection activity was arbitrary and capricious" (page 35, lines 4-5). In effect, OMB could only seek Paperwork Reduction Act review of an unchanged information collection "required by" an existing rule if the agency failure to act was "arbitrary and capricious"--a standard under the Administrative Procedure Act that would be almost impossible to meet, particularly for an information collection in a rule already three years in effect, that had--if litigated--already sustained a challenge on the very same grounds.

Although new Sec. 3507(j) (page 33, lines 13-14) purports to permit OMB to oversee in some sense agency self-certification of ongoing, unchanged information collections "required by [an existing] rule", the effect is to deny OMB practical oversight authority to apply the existing statutory criteria of agency need, practical utility, and unreasonable burden criteria that currently apply. This "arbitrary and capricious" standard also appears to invite the courts to apply new principles in reviewing OMB action.

In other words, this proposal would eliminate, for existing, unchanged information collections (90 percent of the paperwork burden faced by the public), any independent review using the fundamental statutory criteria of need, utility, duplication, and excessive burden. Also, as the agency would have to seek OMB reapproval if it changed the collection of information, but would receive, in effect, automatic reapproval for unchanged collections of information, the agency's basic incentives would be to change nothing, regardless of public comment.

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[3] We note a technical problem with having existing Sec. 3507(d) "not apply," but having new Sec. 3507(j) apply, "to a collection of information required by rule." A statutory distinction tied to information collections "required" or "not required" by a rule is unmanageable and impossible to define; almost all agency activity is authorized, required, or otherwise derived from some form of rule or rulemaking authority--in rough terms, at least 90 percent of all Federal information collection. If the Committee wishes, in this or other provisions in S. 1742, to distinguish between "regulatory" and "non-regulatory" paperwork, we recommend that the Committee adopt the terminology in H.R. 3695, Sec. 3502(18) (page 6, lines 15-18), and base any distinction on information collections "contained" or "not contained" in a rule.

Moreover, Sec. 3507(j)(5) & (6) (page 35, line 9, to page 36, line 4) are unclear on what action OMB can take even if it calls in for review an existing, changed regulatory paperwork, as it is unclear to what extent the existing OMB procedures in 5 CFR 1320.14 could be applied.

Federal Information Locator System (FILS). As a general matter, we support new Sec. 3511 (pages 36-38). These provisions resolve ambiguities found in the Act and will make the system far more feasible and workable.

Sec. 3511(a)(2) (page 36, line 23) would provide that the Federal Information Locator System (FILS) is designed to assist agencies and the public in locating "Government information." Absent a precise definition of government information, this language could be construed to include any information maintained by the Federal Government. However, new Sec. 3511(b)(3) (page 37, lines 13-14) states that no information "which is not public information" is to be included in FILS. We recommend the word "Government" in Sec. 3511(a)(2) be changed to "public".

Agency Audits of Major Information Systems. Sec. 3513(d) (page 38, lines 11-20) would require OIRA "on an ongoing basis" to "review standards and requirements for agency audits for all major information systems and assign responsibility for conducting government-wide or multiagency audits." The exclusion for "major information systems used for ... cryptologic activities that are communications security activities" would appear to prohibit OMB's discharge of its computer security responsibilities for electronic funds transfer systems and routine law enforcement systems where such systems use cryptography as part of computer security or for document authentication.

Consultation and Advisory Committees. Sec. 3517 (page 43, line 8, to page 44, line 24) would establish two new advisory committees. Committee members may need to be paid expenses and travel costs, and Federal Advisory Committee Act procedures may require OMB to incur additional expenses. For these committees to operate, the Congress should authorize additional funding for such expenses.

We recommend this provision be amended to permit staggered terms of office for committee members, and to designate the OMB Director, or his or her designee, as chairman (cf. page 48, lines 8-13 and lines 22-24, in H.R. 3695). We also recommend deletion of the 120-day limit for appointments of Committee members. It could well take longer than 120 days to obtain necessary security and conflict-of-interest clearance for possible appointees; how long such clearance can take is uncertain and should not be subject to arbitrary time-limits.

Ongoing Public Disclosure of OIRA Reviews. We strongly recommend that the Committee delete proposed new Sec. 3506(d) (page 25, lines 2-24), its OMB counterpart at Sec. 3518(a) (page 45, line 10, to page 46, line 15), as well as the remainder of Sec. 3518 (page 46, line 16, to page 49, line 14).

The disclosure and review provisions would extend beyond OMB's information collection clearance function into its regulatory review role established by Executive order. These disclosure and review provisions would also extend into OIRA's other Paperwork Reduction Act functions (procurement, telecommunications, and information technology review) and also into its budgetary, legislative, program oversight functions carried out as part of OIRA's support for OMB generally. In other words, the primary effect of these provisions--if interpreted broadly--is to make public any budget, legislative, procurement, regulatory, and paperwork materials related to any issue ever considered by anyone at OIRA.

Sec. 3506(d) (page 25, lines 2-7) appears to require disclosure of Paperwork Reduction Act and other review documents concurrently with OMB review. Such concurrent disclosure of agency rulemaking activities is explicitly required by Sec. 3518(b)(1) (page 46, lines 16-23).

This provision raises serious constitutional concerns. The Department of Justice believes that such a requirement would strike at the very heart of the President's constitutional authority over agency rulemaking by opening to public scrutiny deliberative materials generated as a result of the regulatory review process under Executive Orders 12291 and 12498.

Further, as a practical matter, these provisions would have four damaging effects. First, they would chill discussion between the agencies and OMB. Agencies would be reluctant to submit draft documents vital to the decisionmaking process for fear of public misunderstanding while the deliberative process is still ongoing. Second, these provisions would statutorily expand the information that is now disclosed by agencies as part of the rulemaking process, and thus have the effect of making a fundamental change in agency implementation of the Administrative Procedure Act and in the applicable standards of administrative law. Third, having OMB make public all review documents renders OIRA practically powerless to obtain or consider any administratively or formally confidential materials related to the review process. OIRA's review of "security of records, ... automatic data processing, telecommunications, and other information technology" (page 11, lines 9, and 11-12), as well as certain paperwork and regulatory matters, now requires access to and review of such materials.

Fourth, a serious public policy inconsistency would arise. Agencies would remain free to share documents with private parties, other agencies, or with Congress without public disclosure. Yet these same agencies would not be able to share documents to obtain advice from a component in the Executive Office of the President, unless they were publicly disclosed while the deliberations were still ongoing. This differential treatment is contrary to sound public policy; by favoring communications between the agency and private or public entities other than OMB, the agency generally responsible for managerial oversight on behalf of the Executive, such a provision would weaken accountability and responsibility within the Executive branch.

Additionally, we strongly recommend that Sec. 3518(b)(6) (page 49, lines 1-14) be deleted. This provision would impose a 30-day (90-day for "major" rules) time limit on OIRA review of regulations. This statutory limitation is objectionable for generally the same reasons as set forth above with respect to statutory disclosure requirements; legislating deadlines for exercise of Executive oversight responsibilities such as this would be inappropriate and counterproductive.

Important substantive reviews and interagency coordination take time. Codification of such deadlines for OMB regulatory reviews could invite agencies to stall coordination efforts until the deadline had past, would interfere with budget and management review of pertinent rulemakings, and would generally make it more difficult for the Executive branch to develop coordinated policy positions in an orderly way.

Authorization of Appropriations. New Sec. 3521 (page 49, lines 16-20) would authorize appropriations for the Office of Information and Regulatory Affairs in OMB to carry out the provisions of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. chapter 35) for fiscal years 1990 and 1991. As appropriations have already been provided to OMB for these purposes in fiscal year 1990, we recommend that this reauthorization begin in fiscal year 1991, and extend on from that fiscal year.

We also recommend strongly that the two year reauthorization be extended to four years. The proposed changes to the Paperwork Reduction Act would take time to implement. For OIRA to implement these new activities and build a "track record" so that Congress could fairly evaluate whether to continue or further amend these new statutory responsibilities would require longer than the two-years included in S. 1742.

Commission on Federal Information, Title II. OMB's paperwork review process has been in place for nearly 50 years, has been long supported by Congress, and modified only slowly and after deliberate consideration. Many of the changes that the Paperwork Reduction Act of 1980 made to the Federal Reports Act of 1942 were supported by the 1977 reports from the Commission on Federal Paperwork (established in 1974).

In Title II, S. 1742 appears to be taking this same approach. The "Commission on Federal Information" (Title II, pages 54-61) is directed to consider issues relating to the substance and implementation of the Paperwork Reduction Act.

Inconsistent with this approach, however, Title I of S. 1742 offers answers to the questions to which the Commission is asked to respond. Thus, the detailed changes S. 1742 would make appear to prejudge the Commission's recommendations through legislative amendment concerning the same problems the Commission would review. It is anomalous and premature for legislation to provide answers to asserted problems, while simultaneously creating a Commission to analyze these same problems.

We therefore recommend that the Committee convert the detailed provisions in S. 1742 involving the collection, management, and dissemination of statistical and other Federal information into more general statements of information resources management policy, and that the Committee withhold any detailed statutory changes in these areas until the Congress has had an opportunity to consider the Commission's recommendations.

In addition, many of the issues raised in amendments to the Paperwork Reduction Act are complex and interrelated, and would well benefit from being considered by such a Commission for study. Yet, S. 1742 would have the Commission issue its final report in less than 18 months, and reauthorize appropriations for OIRA to implement the Paperwork Reduction Act for only two years.

We strongly recommend that the Commission's life of 18 months be extended to three years in order to permit an orderly appropriation of funding, appointment of the Commissioners, hiring of staff, and adequate consideration of the many complex and interrelated issues involved. Extending OIRA's reauthorization to four years would then allow the Congress, in the context of the next reauthorization, to consider in an orderly way the Commission's recommendations and their impact on agencies' and OMB's paperwork clearance and information resources management programs.

Similarly, we recommend deletion of the time limit for having the President make his initial appointments (Sec. 204(e) (page 59, lines 4-6)). Even assuming the President rapidly selects possible candidates, it will take longer than 60 days to obtain necessary security and conflict-of-interest clearance for possible appointees; how long such clearance can take is uncertain and should not be subject to arbitrary time-limits.

There is also a need to coordinate the timing of the Commission's recommendations with the GAO report on "changes in law or administrative improvements" called for by new subsection 3514(d)(2) (page 42, lines 9-19). It would seem logical for GAO to have sufficient time following publication of any Commission recommendations to consider how the GAO recommendations should properly reflect the recommendations of the Commission.

As a technical matter, we recommend the findings in Sec. 201 (page 54, line 20, to page 55, line 12) and functions in Sec. 203 (page 55, line 17, to page 56, line 18) of the Commission be broadened, to reflect existing concerns about respondent burden and to give the Commission the ability to select areas of inquiry related to the many complex and interrelated issues it is being asked to study. We also recommend the Committee add, in acknowledgment of the Federal system in which the Federal Government operates, after the word "welfare" in Sec. 203(a)(1) (page 55, line 24), the following, ", especially to State and local governments,".

We also recommend the Committee limit the scope of the Commission's subpoena power in Sec. 206(a) (page 59, line 16, to page 60, line 2) and requests for information from Federal agencies in Sec. 207(a) (page 60, line 22, to page 61, line 3) in order to prevent the Commission, or any member thereof, from being able to force agencies to provide information and other support services involuntarily. As some members of the Commission will be individual Members of Congress, such statutory powers could raise separation of powers issues.

Review of Allegations of OMB Interference

Over the last year, several groups have charged the Office of Management and Budget and/or the Task Force on Regulatory Relief with obstructing the issuance of needed health, safety, and environmental regulation and information collections. These groups include Public Citizen and OMB Watch. The following set of 29 case studies examines these allegations.

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Title: Labeling of Meat Products Containing Mechanically Separated Meat

Significance: OMB is concerned that food standards and labeling requirements are used as barriers to innovative yet nutritious products. For example, when margarine was first marketed the processors were prohibited from adding beta carotene to make the white substance appear more yellow; i.e. like butter. Margarine now provides consumers with a nutritious, low-cholesterol, low-cost alternative to butter. Similarly, the prominent labeling requirements for products containing mechanically separate meat were considered more burdensome than was warranted by the scientific evidence regarding MSM. OMB argued that sufficient information was offered the consumer through the list of ingredient labeling requirements.

Inaccuracies: Although OMB supported the USDA amendments to the regulations in which the prominently placed phrase "mechanically processed beef (or pork) product" and references to bone were deleted, OMB did oppose the 1988 USDA proposal.

Rebuttal: In July of 1988, USDA submitted a proposed rule to OMB. The rule was a result of an industry petition that would totally exempt mechanically separated meat from the requirement that it be included in the list of ingredients.

On August 12, 1988, OMB returned to USDA for reconsideration this proposed rule as inconsistent with several of the Administration's regulatory principles. We argued that, indeed, the USDA must enforce the Federal Meat Inspection Act which prohibits the sale of any processed meat product if its labeling is "false or misleading in any particular." Since, by the petitioner's own argument, consumers are reluctant to purchase a product containing mechanically separated meat, (that is, are using the information), then it does not follow that this information should be deleted.

Secretary Lyng chose to publish this proposed rule despite OMB's objection, in September 1988. USDA has not proposed a final rule.

Topic: EPA's Ban of Asbestos Use in Products (Final Rule)

Summary: EPA's final rule bans asbestos use in 29 product categories, representing 94 percent of current asbestos use. EPA estimates that its ban will impose a present value cost of about $460 million over the next 13 years. EPA's final rule allows, however, the continued use of asbestos in 12 relatively low-risk product categories (accounting for 6 percent of current asbestos use). The net benefits to society of EPA's exclusion of these 12 products exceeds $5 billion over the same period.

The Charge: OMB is responsible for the five years between the time EPA drafted its proposed rule and when it published its final rule. As recently as this year, OMB delayed the rule for six months. (More specific charges are answered on the next page.)

Rebuttal: While it is true that five years elapsed between the time EPA produced a draft proposal and the time it published its final rule, much of this period did not involve OMB review. Nearly three of those years were taken up in EPA's normal rulemaking process. EPA published the proposed rule on January 29, 1986. The extended comment period closed at the end of June, 1986. In July, 1986, EPA held a legislative hearing and in October of that year it held extensive cross-examination hearings of EPA staff and its contractors. In April and May of 1988, EPA sought public comment on its various analyses. Finally, in September, 1988, EPA held further cross-examination hearings. EPA submitted a draft final rule for OMB review on December 19, 1988.

From the beginning, OMB review recognized that a ban of asbestos use is appropriate in some product categories but that a total ban of asbestos use could impose substantial costs on the United States without achieving commensurate reductions in public health risks. The draft final rule as submitted to OMB largely reflected this view.

Title: Environmental Protection Agency/Asbestos (Proposed Rule)

Significance: Asbestos fibers are known human carcinogens that are released during the manufacture, processing, use, and disposal of asbestos products.

The Charges: "Since 1984, at the request of the industries that make and use asbestos products, OMB has delayed EPA's issuance of a rule that would phase out the use of asbestos products. In concluding that the benefits of EPA's asbestos rule did not outweigh its costs OMB decided that a life lost to cancer is worth only $208,000 -- a calculation that one Congressional Committee found 'morally repugnant'." "OMB [had] numerous secret contacts with industry representatives opposed to EPA's asbestos rules."

The Factual Inaccurances:

1. "Secret Contacts with Industry" - The concerns OMB raised with EPA's rule were not in response to any "request of the industries that make and use asbestos products" because OMB had no contacts with industry. The meetings that took place at OMB were not with industry, but with the Interior Department and with representatives of the Canadian government. Both of these contacts were made at EPA's suggestion. The accusations of industry "contacts" made in the House Subcommittee hearings refer to the fact that a search of OMB files revealed that one member of the staff had copies of papers from the public dockets at EPA and OSHA. These are hardly "secret contacts".

2. A $208,000 Price Tag on Life - OMB never took the position that a life is worth $208,000 nor did it ever calculate that number.

Rebuttal: First, contrary to the accusation in the cover letter of the report, Vice President George Bush and the Task Force had no involvement in EPA's asbestos rulemaking. The rule was not sent to OMB for review until 1984, one year after the Task Force was dissolved.

Second, OMB never advocated assigning a value per life of $208,000 or any other amount. That number came up in the House Oversight Committee hearings but was never derived by OMB.

Third, the issues OMB raised with the rule were not based on any communication with industry but on EPA's own regulatory impact analysis (RIA) and its statutory requirements. The RIA indicated that the rule to ban asbestos products would actually increase deaths, because the substitutes for some uses were much less safe. Regardless of the value of life, a rule that results in a net loss of lives is not good public policy.

Finally, OMB has not refused to approve EPA's rule since 1984. A proposal was approved by OMB and published in 1986.

CHRONOLOGY

Citizen petitioned for rulemaking:	June 21, 1979
EPA granted petition:	October 18, 1979
EPA published advance notice of proposed rulemaking:	October 17, 1979
EPA published asbestos-related activities reporting rule:	July 30, 1982
EPA submitted draft proposed rule to OMB:	June 15, 1984
EPA withdrew draft proposal for reconsideration:	February 1, 1985
EPA resubmitted proposal:	December 16, 1985
OMB concluded review of proposal:	January 21, 1986
EPA published NPRM:	January 29, 1986
EPA submitted draft final rule:	December 19, 1988
OMB requested that EPA consider marketable permit approach as an alternative to its ban/phaseout for 16 products:	February 21, 1989
EPA response to OMB proposal; meeting with Jay Plager:	May 25, 1989
OMB concludes review after EPA submits revisions to draft rule:	June 19, 1989
EPA Publishes Final Rule	July 12, 1989

EPA/STANDARDS FOR VOC EMISSIONS FROM THE CHEMICAL INDUSTRY

Summary: The Clean Air Act requires the Environmental Protection Agency (EPA) to establish technology-based emission limits for "new" plants under Section 111. (EPA also prepares Control Technique Guidance documents setting a presumptive norm for Reasonably Available Control Technology standards for plants in nonattainment areas.)

Some charge that the Office of Management and Budget (OMB) has caused undue delay and that the law does not allow the consideration of cost in developing these standards.

Discussion: Since 1981, EPA has published 13 standards limiting VOC emissions from new and existing sources in the chemical and refining industry. In general, OMB and EPA have agreed on the appropriate level of standards for VOC emissions. OMB did return to EPA for reconsideration three draft rules which would affect the Synthetic Organic Chemical Manufacturing Industry (SOCMI) on two separate occasions. The draft rules would have set a $2,650 per ton cutoff for additional emission controls. This cutoff is significantly higher than EPA estimates of the likely benefits of VOC control.

There has been a long debate within EPA as well as between EPA and OMB on an appropriate cost-per-ton ceiling. A partial resolution was reached with an internal EPA agreement to use a cutoff of $1,200 per ton (after an extensive review suggested that the likely benefits of VOC control are on the order of $500 per ton).

Section 111 of the Clean Air Act expressly provides that in setting standards, the Administrator may consider such factors as "the cost of achieving such emission reduction and any non-air quality health and environmental impact and energy requirements." Therefore, costs may be considered in setting these standards. There has never been any disagreement between the agencies on this question. Even before Executive Order No. 12291 was issued in 1981, EPA was using a cut-off of $2,000 per ton in setting VOC emission standards.

Chronology:

May 5, 1983	EPA submits a NRPM for SOCMI air oxidations for E.O. No. 12291 review.
Sept. 8, 1983	EPA submits a NRPM for SOCMI distillation for E.O. No. 12291 review.
Sept. 16, 1983	OMB concludes review on the SOCMI air oxidation NPRM.
Oct. 21, 1983	EPA publishes the NPRM for SOCMI air oxidation in the Federal Register.
Dec. 1, 1983	OMB concludes review on the SOCMI distillation NPRM.
Dec. 30, 1983	EPA publishes the NPRM for SOCMI distillation in the Federal Register.
Jan. 29, 1986	EPA submits the final SOCMI air oxidation rule and the final SOCMI distillation rule for E.O. No. 12291 review.
Feb. 11, 1986	EPA submits a NPRM for SOCMI reactor processes for E.O. No.12291 review.
Nov. 25, 1986	OMB returns the final SOCMI air oxidation rule, the final SOCMI distillation rule and the NPRM for SOCMI reactor processes for reconsideration because of the high cost per ton of these rules.
Nov. 10, 1988	EPA resubmits the three SOCMI rules for Executive Order No. 12291 review.
April 10, 1989	OMB returns the three SOCMI rules for reconsideration because of the high cost per ton of these rules.

EPA/Underground Storage Tanks

Summary: The 1984 amendments to the Resource Conservation and Recovery Act required Environmental Protection Agency (EPA) to promulgate final permitting standards for underground storage tanks (hazardous waste tanks only) by March 1, 1985. EPA submitted proposed rules to OMB for Executive Order No. 12291 review on March 4, 1985 - three days after the deadline for final rules. After negotiations regarding several issues, OMB completed review on June 12, 1985. The rules were published by EPA on June 26, 1985.

Charge: OMB improperly halted the promulgation of UST regulations beyond a statutory deadline.

Rebuttal: OMB review of these regulations raised important questions which required re-examination by EPA managers. The merits of these questions have not been challenged. What was challenged was the authority of OMB review to delay the promulgation of rules beyond a statutory deadline. This challenge led to a D.C. District Court opinion in 1986 (EDF v Thomas) stating that "OMB has no authority to use its regulatory review under Executive Order 12291 to delay promulgation of EPA regulations arising from the 1984 RCRA Amendments beyond the date of a statutory deadline."

We continue to abide by both the Court's decision and Section 8 of the Executive Order. Section 8 specifically exempts from review any regulation for which OMB review would conflict with statutory or judical deadlines, provided that the Director is adequately notified by the Agency of the need to make this exemption.

Title: Dumping Toxic Chemicals in Sewers

Significance: Electroplating pretreatment rules established national, technology-based standards requiring roughly 90 percent removal of the toxic pollutants (heavy metals and cyanide) discharged by the electroplating industry into municipal sewage treatment systems. EPA estimated that in order to meet these pretreatment standards, the electroplating industry would incur capital costs of $1.3 billion and annual costs of $490 million (in 1986 dollars). Electroplaters have been shown to be a major source of toxic water pollution. In addition to the categorical electroplating pretreatment standards, EPA also promulgated general pretreatment regulations requiring municipal sewage treatment systems to establish pretreatment programs. These regulations establish a national program for controlling industrial discharges into municipal sewage systems. EPA promised to review its pretreatment program to evaluate whether it appropriately balances environmental protection, economic impacts, and flexibility for States and localities.

The Charges: The Task Force directed EPA to suspend these rules. If a Federal court had not intervened to revoke the suspension, this action would have resulted in large discharges of toxic metals and toxic inorganics into the nation's sewer system.

Rebuttal: EPA's rules required uniform national treatment standards for major industries discharging to municipal sewer systems. Since municipal systems can effectively treat industrial wastes, EPA's national standards required unnecessary treatment prior to the discharge to the sewer system in many areas of the country. For example, municipal systems (such as Los Angeles) already had sophisticated pretreatment systems in place that were better suited to their local conditions. The national requirements under EPA's rules inevitably impose additional unnecessary costs for the treatment of industrial wastewaters before they are discharged to a municipal sewage treatment plant.

Chronology

Rule designated for postponement by the Task Force	March 28, 1981
EPA rule deferring effective date	September 2, 1981
Court decision overturning EPA deferral	July 1982

Title: Environmental Protection Agency/Lead Phasedown

Significance: EPA rules required a further reduction in the maximum amount of lead in gasoline from 0.8 grams per gallon to 0.5 grams per gallon beginning in 1982. In setting these requirements, EPA had identified lead in gasoline with elevated blood lead levels in children and in elevated emissions from newer cars that were "mis-fueled" with leaded gasoline. The phasedown of lead, on the other hand, was projected to impose a substantial energy penalty because of the increased amount of crude oil required to produce low-lead or unleaded gasoline. EPA agreed to open a rulemaking to consider relaxing or rescinding the lead phasedown rule.

The Charges: Lead is a major health hazard--especially to children. If the Task Force had been successful in eliminating the phasedown, lead levels in children would have increased with serious health effects for hundreds of thousands of children.

Rebuttal: After careful study of the lead phasedown rule, it became clear that the benefits of reducing lead in gasoline justified a much more stringent regulation. As a result, lead levels in leaded gasoline have been reduced to 0.1 grams per gallon--a 90 percent reduction from the levels prevailing in 1980.

Rule designated for postponement by Task Force	August 11, 1981
EPA suspends effective date of the deadline	February 1982
Administration announces a revised limit of lead, but prohibits averaging between leaded and unleaded fuels	October 1982
EPA proposes a reduction of allowable lead levels to 0.1 grams per leaded gallon	August 2, 1984
Final Rule Limiting Lead in Gasoline	March 1985

EPA/OMB REVIEW OF THE ASBESTOS NESHAP ICR

Summary: On May 13, 1987, the Environmental Protection Agency (EPA) submitted for Executive Order No. 12291 review a draft proposed rule amending the asbestos national emission standard for hazardous air pollutants (NESHAP). On July 29, 1987, we concluded review of the draft proposed rule. The proposal was published on January 10, 1989.

EPA submitted the information collection request (ICR) associated with the proposed rule for OMB review on January 4, 1989. While reviewing the ICR, it became clear that it did not fully justify specific information requirements. Therefore, on March 1, we informed EPA that we could not approve the ICR and filed comments for the public record asking EPA to further explain certain requirements. [For example, why is it necessary for demolition companies to notify EPA of demolitions even when no asbestos is present?] We expect EPA will address these comments in the final asbestos rule and associated ICR.

The Charge: OMB disapproved an ICR fundamental to the EPA's administration of the asbestos NESHAP.

OMB Rebuttal: The decision not to approve the ICR in question at the NPRM stage did not interfere with EPA's administration of the asbestos NESHAP. The ICR was associated with a proposed revision to the asbestos NESHAP and as such had no effect on the current asbestos NESHAP information requirements. Further, our decision not to approve the ICR at the NPRM stage is consistent with the Paperwork Reduction Act and OMB regulations for the review of ICRs associated with proposed rules. We expect EPA to address our comments in developing its ICR at the final rule stage of the process.

Chronology:

May 13, 1987	EPA submits draft NPRM amending the asbestos NESHAP for Executive Order No. 12291 review.
July 29, 1987	OMB concludes review of draft NPRM.
Jan. 4, 1989	EPA submits the ICR associated with the asbestos NPRM for review under the Paperwork Reduction Act.
Jan. 10, 1989	The NPRM is published in the Federal Register.
March 1, 1989	OMB notifies EPA that it cannot approve the ICR associated with the asbestos NPRM and files comments for the public record.

EPA/PESTICIDE MANUFACTURING CENSUS OF 1987

Summary: On January 11, 1988, the Environmental Protection Agency (EPA) submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act (PRA) a two-part questionnaire entitled "Pesticide Manufacturing Facility Census for 1986." Part A of this ICR requested detailed technical information on the operations and effluent wastewater characteristics of the industry; Part B requested detailed financial information on a product-by-product basis for each plant in the industry. OMB approved the technical part of the questionnaire in April of 1988; but, OMB disapproved the financial portion of the questionnaire because EPA has not demonstrated the practical utility of the data request or that it adopted the least burdensome approach. EPA re-submitted the ICR for the financial portion of the survey in October 1988. After further negotiation between EPA and the industry, EPA submitted additional revisions -- making responses to some questions voluntary -- on December 20, 1987. OMB approved the financial portion of the ICR on December 22, 1988.

Discussion: Comments submitted during OMB's review indicated a number of problems with the questionnaire. Under the PRA, OMB has the responsibility to minimize burden and assure the practical utility of the data request. EPA's revisions of the ICR -- reducing burden by at least 50 percent -- confirm our conclusion that alternatives were available to minimize the burden of this collection.

Thus, OMB's role in the review of EPA's Pesticide Census ICR under the PRA resulted in substantially broader consultation with the respondents and better information upon which to base regulatory decisions. OMB's five month review of both ICRs associated with this questionnaire did not delay EPA's schedule (most of that time was spent by EPA consulting with respondents that should have been done prior to OMB review) and resulted in a product that was both less burdensome (at least 50 percent reduction in burden) while meeting the statutory requirements.

EPA/Pesticide Manufacturers Census

Chronology:

EPA submits ICR for its Census of Pesticide Manufacturers	January 11, 1988
OMB approves technical ICR (Part A); OMB disapproves financial portion of ICR (Part B	April , 1988
EPA submits revised financial survey to OMB	October , 1988
EPA submits further revisions to the financial survey	December 20, 1988
OMB approves ICR	December 22, 1988

Title: Video Display Terminals

Significance: Concerns have been raised about potential adverse reproductive effects from emissions from video display terminals (VDTs) in wide use throughout the country. In September 1985, NIOSH submitted for OMB review a study entitled "Reproductive Study of Women Who Work with Video Display Terminals (VDTs)." In December, OMB disapproved the study because "it would have imposed unnecessary reporting on respondents and ... it lacked practical utility" due to several methodological deficiencies that would have affected the validity of study findings.

NIOSH submitted a modified study protocol in May 1986, which OMB approved on the condition that NIOSH: (1) delete questions about fertility because the protocol contained no hypothesis relating fertility to VDT exposure and because the study did not have the statistical power to test any such hypothesis; and (2) delete questions about stress because, again, there was no hypothesis regarding stress and adverse pregnancy outcomes, the study could not control for stress in the analysis, and the questions would have significantly increased interview time and could have adversely affected the response rate.

The Charges: "After delaying the study for several years, at the request of the telecommunications industry...OMB finally allowed NIOSH to conduct a study, but insisted on changes in the methodology that are guaranteed to undermine the results and thereby forestall any government regulation to reduce VDT exposure." Public Citizen also charges that OMB had second-guessed agency scientists.

The Factual Inaccuracies: The 1985 OMB disapproval did delay the study for about one year, not "several years."

Rebuttal: OMB responded to its critics at length in letters to Congressman Ted Weiss and Senator Levin in November and December 1986. In these letters, OMB replied that its conditions of approval had improved the quality of the study and that therefore it would be more useful to Federal agencies, not less useful. In addition, OIRA Administrator Wendy Gramm stated that OIRA staff were well qualified to assess the statistical methodology of Federal studies.

Public Citizen bases its charge that OMB had intervened on behalf of industry on the fact that OIRA had received public comments from Bell South (a studied industry) raising some of the same concerns that OMB raised. OMB has stated that OIRA reached its conclusions independently of Bell South, and in fact disagreed with Bell South on several points.

In the December 1986 letter to Weiss, OIRA Administrator Wendy Gramm stated that "much of the opposition to OMB's changes has little to do with the substance of such changes. Rather, the VDT study is being used by a few individuals as a vehicle to object to OMB review of research studies." Gramm stated that "OMB has an obligation" to review such studies, which are "designed to serve public policy purposes." Gramm stated that OMB was not trying to prevent research on VDTs, but that "Our...correspondence with NIOSH on the VDT study emphasized that we believe study of this issue is important and necessary."

Title: Lead in Holloware Pottery

Significance: The rule would reduce the allowable level for the leaching of lead from ceramic pitchers. Ingestion of lead above certain levels is known to cause serious adverse health effects, particularly for children.

The Charges: OMB watch asserted that OIRA returned this rule for reconsideration in May 1989 and that it was later approved after a Government Operations Committee Hearings.

Inaccuracies: The rule was never returned for reconsideration and was infact cleared on May 19, 1989. The Government Operations Committee Hearing had no bearing on the review of the rule.

Rebuttal: None needed in light of the inaccuracy of the charge.

Title:	Medical Device Reporting
Significance:	Medical device reporting is required in regulation when manufacturers receive reports on certain types of device malfunctions that have or could be related to serious adverse health outcomes.
The Charges:	OMB watch has asserted that OIRA opposed "the reporting requirements in this rule because of Industry opposition." OMB watch went on to state that "OIRA granted three short-term approvals for the paperwork, each time demanding that FDA either better justify the rule's paperwork requirement or better response to industry's criticism. (February, 1988; April, 1988; and May, 1987)"
Inaccuracies:	OIRA did provide three short term clearances, the February clearance, however, was in February 1987 not 1988.
Rebuttal:	OIRA did not oppose the requirements, but did expect FDA to have adequate justification for the requirements that industry had identified as either unnecessary or overly burdensome.

Title:	National Survey of Health and Sexual Behavior: AIDS Behavior Pretest
Significance:	Pretest of a study to gain nationally representative data on risk behavior and attitudes related to AIDS and other sexually transmitted diseases.
The Charges:	OMB watch implies HHS withdrew this paperwork twice because of OMB.
The Factual Inaccuracies:	HHS made the decision to withdraw the survey request in both instances.
Rebuttal:	OMB's review was rather lengthy due to substantial public comment. As indicated in the April 6, 1989 letter from Director Darman to Secretary Sullivan, OMB had concerns that the survey was not adequately focused for its intended purpose. As a result of this concern and the estimated cost for the national survey to be conducted after the pretest OMB requested that HHS take a closer look at the scope of the survey.

Title: FDA Speeding Drug Approval

Significance: Expediting the approval for promising new drugs that treat life-threatening illnesses for which there are no alternative therapies (such as AIDS and many cancers).

The Charges: Congressman Weiss asserted that OMB forced FDA to issue a proposed rule that would have threatened the integrity of all clinical trials by causing the premature release of drugs. Weiss also believes OMB substituted its opinion for the expert judgment of the agency (FDA).

The Factual Inaccuracies: OMB did not force the FDA to issue a rule. Any final decisions on regulations always rest with the agency. Consequently, OMB does not and can not substitute its opinion for that of the agency.

Rebuttal: OMB supported a proposed rule that would make promising new drugs to treat life-threatening illnesses available as early in the drug approval process as is possible. To achieve this end, OMB advocated an approach where, absent proof of the absence of therapeutic benefit, or proof of unreasonable and significant additional risk to the patient of illness or injury, treatment use of an investigational new drug (IND) would be allowed. In addition, OMB advocated a provision for sale of investigational drugs provided for treatment use. Numerous comments were received about these provisions and both were revised in the final rule. OMB supported these revisions yet continued to have concerns that the new provisions would not give significant relief to the desperately ill. Subsequent to the publication of the treatment-use rules OMB has continued to work with FDA to find additional ways to make these drugs available sooner. The new parallel track proposal could be viewed as evidence that the 1987 treatment IND rule may not have gone far enough.

Title: Color Additives

Significance: Color additives have little or no intrinsic benefit and primarily provide visual appeal. According to the Food, Drug, and Cosmetic Act, they are deemed unsafe if they are found to cause cancer in man or animal.

The Charges: From 1983 to 1986, the Task Force and OMB pressured FDA to allow carcinogenic dyes on the market.

The Factual Inaccuracies: There was no Task force involvement in this issue. OMB did recommend the use of a de minimis policy when evaluating all food additives and FDA agreed that it did not make sense to spend agency resources on negligible risks.

Rebuttal: The risks of listed colors are all negligible and would probably not have been detected with less advanced scientific techniques (available when the legislation was passed). For example, Orange 17 poses a 1 in 19 billion risk of additional cancers. Although the court did determine FDA's policy was not consistent with the statute for color additives, the court also stated:

"Assuming as always the validity of the risk assessments, we believe the risk posed by the two dyes would have to be characterized as 'acceptable.'"

Title: Toxic Shock Syndrome (TSS)

Significance: The Federal Government's failure to act in the face of evidence that tampon absorbency is linked to TSS and the absence of requirements that enable interbrand comparisons.

The Charge: Public Citizen charged the following: the Task Force's "deregulation rush" somehow influenced FDA not to act for 5 years; OMB held FDA's regulatory proposal for 15 months; and the delay left millions of women at risk because of denied information.

Based on a recent FDA decision to repropose the TSS rule, renewed charges of OMB delay have been made. Congressman Conyers raised additional questions about OMB contact with manufacturers and the influence of such alleged contacts on OMB's review.

The Factual Inaccuracies: OMB's review of FDA's initial proposed rule took approximately 3 months (6/7/88 - 9/16/88). Including informal reviews of FDA draft rules, OMB's review of FDA's latest TSS rulemaking only took approximately 2 months (3/29 to 6/7). During that time period, the Assistant Secretary's Office for Planning and Evaluation, HHS raised concerns similar to OMB's concerns. OMB's primary concern was the problem of required reformulation resulting in some women purchasing more absorbent tampons. OMB was not party to the decision to repropose the rule rather than issue a final rule. OMB did not propose the revised absorbency terms. No one on OIRA's staff ever visited a tampon factory. Other than receiving letters that transmitted copies of public comments to FDA from manufacturers, OMB had no contact with any tampon manufacturers.

Rebuttal:

During the period that OMB had the rule under review, three fundamental questions were addressed: 1) would the labeling have any effect on behavior; 2) did the initial proposal on labeling and nomenclature give an unwarranted and unnecessary advantage to one major manufacture; and 3) would the rule have a perverse effect on the range of absorbencies available on the market (i.e., by creating fixed absorbency ranges that force reformulation certain consumers may end up using higher absorbencies). These questions are important.

It is highly doubtful that millions of women are at risk because: 1) information on the relationships between TSS and tampons has been provided in and on tampon packaging since 6/82; 2) if a consumer wants to avoid the risk she can use sanitary napkins; 3) most women are brand loyal; and 4) there is no evidence that consumers will change their behavior on the basis of the labeling.

Title: Patient Package Inserts (PPI)

Significance: Point of purchase information (patient package inserts) on proper use of drugs, would warn consumers about adverse effects and potential safety hazards.

The Charges: In 1987, the Task Force on Regulatory Relief upon the request of some drug companies, stopped FDA's PPI program from going forward.

The Factual Inaccuracies: Neither the Vice President nor his staff was involved in any discussion, with FDA or OMB on this issue.

Rebuttal: Based upon cost estimates that a national PPI program would cost over $100 million annually, and research findings showing that PPI's did not change behavior, the Commissioner of FDA decided not to pursue the PPI program. In lieu of PPI's, the American Medical Association and others have been engaged in activities to promote and improved consumer understanding of drug effects.

Title: Infant Formula

Significance: Adequate batch testing requirements and nutritional standards for infant formula are needed to ensure infant formula safety.

The Charges: OMB delayed for 8 months issuance of rules on infant formula.

The Factual Inaccuracies: OMB had absolutely no involvement in the infant formula rules other than to review them and clear them within 7 days of receipt.

Rebuttal: The delay cited in the charge took place in the Agency i.e., the Food and Drug Administration (FDA). In December 1980, FDA published the proposed rule and estimated the Final rule would be effective in March 1982. As it turned out the Final rule was instead effective in July 1982, hardly an 18 months delay and virtually no delay on the part of OMB.

Title: Aspirin and Reye's Syndrome

Significance: Reye's syndrome is a serious disease that affects children, and has been linked to use of aspirin. Warning labels required by FDA would alert parents to this relationship.

The Charges: OMB, acting under the influence of the aspirin industry, delayed from 1982 to 1986 issuance of rules requiring warning labels.

The Factual Inaccuracies: The decision to delay was made by then Secretary Richard Schweiker based in large part on the recommendation of the American Academy of Pediatrics. Public Citizen's claim that 3,000 children contracted Reye's from 1982 - 1986 is inaccurate. CDC reports 800 children contracted the disease during this period.

Rebuttal: Discussions concerning the Reyes Syndrome warning labels exclusively involved the adequacy of the scientific evidence and the possible adverse health consequences of discouraging the use of aspirin in medically appropriate circumstances. In 1982 the rule would have followed on the heels of the tylenol scare and there was a serious concern that parents would be unwilling to give their children any medication for fevers. During the 1982 - 1986 period, industry voluntarily placed Reye's syndrome warnings on aspirin labels. Moreover, during this period CDC was conducting a definitive epidemiologic study on the Aspirin-Reye relationship.

Title: OSHA Formaldehyde Standard

Significance: On December 4, 1987, OSHA published a final rule lowering the permissible exposure limit (PEL) for airborne formaldehyde from 3 parts per million (ppm) to 1 ppm, and establishing a number of ancillary requirements for medical examsn, monitoring, and recordkeeping. OSHA estimated that the rule would prevent each year between 0.1 to 1 cancers, 6,000 cases of respiratory irritation, and 11,000 cases of dermatitis, at an annual cost of $64 million.

The Charges: The two concerns that have been raised involve an alleged OMB "delay" of the OSHA rule and the possibility of unwarranted OMB "interference" with the scientific conclusions of OSHA staff scientists. Neither concern is supported by the facts of the case.

Timing of OMB Review: Over the three-year period that DOL required to develop and complete the formaldehyde rule, OMB review encompassed a total of 25 days. Due to a judicial deadline, the Department did not submit the NPRM to OMB for review under Executive Order No. 12291 (see Section 8(a)(2) of the Executive Order), although OMB did respond to informal drafts while the rule was being developed. Hence, OMB review did not delay the proposed rule a single day.

The final rule was also under a judicial deadline. OMB's review of the final rule encompassed 25 days, and did not prevent the Department from meeting the judicial deadline.

Substance of OMB Review: Following publication of the proposed formaldehyde rule, OMB submitted a 94-page filing to the public record. OMB's comments discussed in detail the OSHA proposal and reached the following conclusions:

- OSHA had presented a well-documented case that the acute health risks of exposure to formaldehyde supported a reduction in workplace exposures.
- The findings of the studies contained in the public record suggested that formaldehyde did not pose a significant carcinogenic risk to workers at current occupational exposures, and that Federal action may not have been warranted.

OMB pointed out that the risks from formaldehyde were at least an order of magnitude lower than risks from other substances that OSHA had regulated and lower than risks posed by most American jobs (OSHA's statistical model that best fit the data estimated that the risk of cancer resulting from one year of exposure to formaldehyde at the highest permissible limit was eight out of ten billion, which is less than one-millionth the annual risk of a job-related fatality in the retail clothing sector). OMB also pointed out that OSHA's risk estimates were extremely sensitive to certain assumptions, discussed the case for and against those assumptions, and showed how the risk estimates would change if different assumptions were made. In addition, OMB compared OSHA's approach to the approach recommended for government-wide application by the Office of Science and Technology Policy in its 1985 risk assessment principles. These analyses suggested that even the low risks estimated by OSHA may have been substantially overstated. It was important that these points, which had not been made by OSHA staff scientists, be explicitly discussed on the record so that OSHA's decision-makers and the public would proceed with a full understanding of the relative risks of formaldehyde and the uncertainty underlying the risk estimates.

OMB also calculated that OSHA's formaldehyde rule would cost much more to reduce statistical cancer risks than other OSHA and Federal health standards. Some options being considered by OSHA would have a significant adverse economic impact on certain industries, including foundries, wood products and textiles, which were struggling to compete against imports. These disparities in risk and cost, and the potential impact of the regulation on affected industries and the jobs of workers in those sectors, raised questions about the reasonableness and economic feasibility of OSHA's proposed formaldehyde rule.

These comments did not "interfere" with the conclusions of OSHA scientists. They accepted, for example, OSHA's designation of formaldehyde as a potential carcinogen. Instead, OMB's filing raised for comment whether the magnitude of risk posed by formaldehyde exposures warranted Federal action, whether OSHA's analysis presented sufficient information to decision-makers to reach an informed decision, and whether OSHA should require the expenditure of significant private sector resources in the face of extreme uncertainty about the risk.

Such decisions are policy decisions that must be coordinated between Federal agencies to ensure that the nation's resources are being spent to mitigate the most serious risks and to avoid inconsistent and contradictory decisions among agencies. These decisions should be made by policy officials who weigh all of the implications of Federal action, including uncertainty, economic impact and technical feasibility, and the significance of the health benefits to be realized. That explicit policy judgment is needed to translate scientific evidence into Federal action was also recognized by the Supreme Court in its 1980 decision to overturn an OSHA rule because OSHA had failed to show that the risk to workers was significant. Said the Supreme Court, "Factual determinations can at most define the risk in some statistical way . . . [the] determination that a particular level of risk is 'significant' will be based largely on policy considerations."

The major source of complaint about OMB "interference" with regard to the formaldehyde rule has been from OSHA staff scientists who state that they were overruled in their determination that the residual risk was "significant." While one may be sympathetic to their views on the subject, this decision is not a scientific conclusion arising from an experiment or research study, but a policy decision properly made by the head of OSHA and properly a subject of comment by OMB.

OMB's role in coordinating Federal policy between agencies was particularly important in the case of formaldehyde. At the time that OMB filed its comments in the public record, three other Federal agencies were considering the issue of whether the potential hazard posed by formaldehyde warranted Federal action, and if so, what action. The Consumer Product Safety Commission had attempted in 1982 to ban urea-formaldehyde foam insulation, but the U.S. Court of Appeals for the Fifth Circuit had overturned the ban because the court felt that the exposure data did not support the agency's conclusions about risk, despite the agency's "scientific" determinations that it did. The Department of Housing and Urban Development (HUD) had regulated formaldehyde emission levels in plywood and particleboard, but not certain kinds of fiberboard, and was considering the need for further regulatory action. The Environmental Protection Agency (EPA) was considering whether, under Section 4(f) of the Toxic Substances Control Act, formaldehyde posed "a significant risk of serious or widespread harm" to textile workers and consumers. Actions that EPA was considering included formally referring regulatory action to agencies such as OSHA and HUD or simply waiting for other agencies to decide if they needed to act. In addition, shortly after OSHA's publication of the NPRM, the National Cancer Institute completed the largest epidemiological study ever done on formaldehyde and concluded that there was "little evidence" that cancer mortality was associated with occupational exposures to formaldehyde. In such a dynamic and chaotic environment, it was particularly important that the Federal Government chart a stable and fully considered course.

The questions raised by OMB in the formaldehyde rulemaking, and in all reviews of Federal safety and health rules, pertain to issues of priority, approach and coordination of a coherent and balanced Federal policy on risk management for workers, consumers and the public. As we stated in the 1988 Regulatory Program of the United States Government: "Federal regulation cannot eliminate all safety, health and environmental risks. As a result, the regulation of each particular safety and health risk has to be kept in balance and proportionate with the regulation of all other such risks." (p. 8).

Title: Ethylene Oxide

Significance: Ethylene oxide (EtO) is a suspected human carcinogen which is a highly effective disinfectant in dilute or gaseous form. It is used extensively in sterilizing operations in hospitals and private medical product sterilizers, as well as in fumigating operations in the spice industry. OSHA has estimated that 68,000 workers are directly exposed in these operations.

OSHA published an NPRM in April 1983 to lower the permissible exposure level (PEL) for EtO, pursuant to a judicial deadline. On June 13, 1984, two days prior to a court-ordered publication date of June 15, OMB received for review the final OSHA standard on EtO. The next day, OIRA Administrator Chris DeMuth delivered to the Solicitor of Labor a public nine-page letter, with attachments, explaining why OMB believed that inclusion of a 15-minute short-term exposure limit (STEL) was not supported by the record (OMB argued that the cancer risk from EtO (1) was associated solely with cumulative dose, and hence was addressed by the 8-hour PEL, and (2) was not associated with the timing or duration of dose, and hence did not fit OSHA's criteria for a STEL). When the rule was sent to the Federal Register the following day, the STEL had been deleted by the Department, pending further consideration of the issues raised by OMB.

OSHA then published a request for comments and submitted the record to several peer reviewers, who largely agreed that a cancer risk was not associated with peak exposures, and hence did not justify inclusion of a STEL. OSHA's decision not to include a STEL was challenged by Public Citizen in the D.C. Circuit Court of Appeals, and the Court ordered OSHA to include a STEL because the residual risk from EtO was significant and a STEL might, in some situations, lower cumulative exposures below the PEL.

The Charges: OMB delayed issuance of an EtO regulation. Also, OMB insisted that OSHA delete the STEL, "stating that OMB has concluded that the rule is inconsistent with the cost/benefit policies of E.O. No. 12291."

Also, "Between 1981, when the OSHA staff originally wanted to issue a new standard for...EtO, and June 1988, when the final rule, including the (STEL) provision, finally became effective, approximately 75,000 workers in health care facilities...were exposed each year to EtO. Calculations show that at least 115 of those workers are likely to die of EtO-induced cancers as a result of OSHA's failure to lower the standard for permanent exposure and to impose a short-term exposure standard."

The Factual Inaccuracies: OMB did not delay issuance of the 1984 OSHA rule at all. In fact, OMB review of the NPRM was constrained by a tight judicial deadline, and OMB review of the final rule took one day. Second, OMB's concerns with the STEL were primarily founded on whether the cancer risk from EtO was associated with peak exposures or total dose, and hence whether EtO met OSHA's own criteria for inclusion of STEL, not on the benefits and costs of the STEL.

Third, the implication that OMB was responsible for 115 cancer deaths is wholly unwarranted. Public Citizen does not explain how it performed its "calculations," but apparently assumed that, as a result of OMB actions, 1981 EtO exposure levels would remain constant through 1988. In reality, OSHA published a full-fledged final rule in 1984 that reduced the PEL from 50 ppm to 1 ppm. The new PEL became effective in December 1984. When OSHA included the STEL in 1988, OSHA concluded that it would have practically no effect since the controls needed to reach the PEL had already reduce exposures below the STEL.

Rebuttal: See above. (1) Public Citizen does not state that OMB's role in the EtO standard is entirely on the record, as a result of the public letter from OMB in the 1984 rulemaking and public comments filed by OMB in the 1988 STEL rulemaking record; (2) The government's brief in the case confirmed that the Secretary of Labor in fact made the ultimate decision to remove the STEL. OIRA Administrator Chris Demuth told the New York Times that, "We thought, after reviewing the data, that there was no plausible evidence to support one section of the rule. We raised the issue with policy-level people, and they agreed with us. OMB did not make the final decision, the Secretary of Labor did."; (3) Public Citizen does not mention that OSHA's peer reviewers of the public record agreed with OMB (and disagreed with OSHA staff) that a STEL was not justified because the cancer risk from EtO was not associated with peak exposures; (4) Public Citizen does not mention that the 1985 court order to include a STEL was based on entirely different grounds than those on which OSHA originally relied and which OMB disputed, and that the court agreed with OMB that OSHA had not supported a STEL on the basis of health effects from peak exposures. (5) The implication that OMB's actions led to 115 deaths is outrageous, and indicates appalling ignorance about the history of the EtO standard.

Title: OSHA Hazard Communication Standard (Workers' Right to Know)

Significance: The Occupational Safety and Health Administration's Hazard Communication Standard (HCS) is the Federal government's largest and most comprehensive disclosure requirement on chemical hazards. The HCS requires material safety data sheets (MSDSs) and warning labels for the transmittal of chemical hazard information to all workers potentially exposed in the workplace, and requires that workers be trained to avoid chemical hazards in the workplace. OSHA published a final HCS in 1983 that covered 20 million workers in the manufacturing sector. In 1987, under court order, OSHA expanded the standard to cover the entire private sector. On October 23, 1987, OMB approved, under the Paperwork Reduction Act, all of the information collection requirements in the expanded HCS except for three provisions dealing with FDA-regulated drugs, consumer products, and MSDS exchange on multi-employer worksites. OMB's authority under the PRA was challenged in the Third Circuit, which decided that OMB had exceeded its authority. The case has been accepted for review by the Supreme Court. Oral argument is scheduled for November 6, 1989.

The Charges: OMB delayed issuance of a final rule for manufacturing for two and a half years. OMB then insisted on changes that eliminated coverage for two-thirds of the workforce, delaying coverage of the nonmanufacturing sector for seven years. OMB then used the Paperwork Reduction Act to block the promulgation of the standard. A U.S. Court of Appeals "ruled that OMB's interference was illegal."

The Factual Inaccuracies: The Task Force did indeed ask DOL to withdraw the 1981 NPRM, but OSHA moved expeditiously to publish a second NPRM in 1982 and a final rule in 1983. OMB did not delay the final rule at all. Neither did OMB have anything to do with limiting the scope of the 1983 rule to the manufacturing sector. OSHA decided to limit the scope on the basis of injury and illness data showing that by far the largest incidence of chemical injuries were in the manufacturing sector. The U.S. Court of Appeals for the Third Circuit did not find that OMB's involvement in the rulemaking was illegal, and did not even address any OMB role other than its 1987 review of the rule's paperwork under the Paperwork Reduction Act (PRA). Rather, the Court found that the PRA did not cover disclosure requirements, and that OMB's 1987 disapproval of three paperwork requirements did not allow OSHA to stay implementation of these requirements.

Rebuttal: OSHA's Hazard Communication Standard was much improved under the Reagan Administration. As OSHA explained in the preamble to the 1983 final rule, the final HCS was both more effective and less costly than the 1981 NPRM. For example, the 1981 NPRM had no education and training requirements to instruct employees on the hazards of chemicals and on precautionary measures. Messages on labels were lengthy and detailed. OSHA wrote, "OSHA had serious questions regarding the overall effectiveness of the January proposal in light of its focus on identification of chemicals rather than on communication of the chemical hazards to employees and employers." (48 FR 53325). By contrast, the 1983 final rule included training and education requirements, and made the labels more effective by including only an identifier and a hazard warning. Moreover, the 1983 rule reduced the cost of the 1981 NPRM by $2 billion in initial costs and $1.1 billion in annual costs, with total present-value savings of $19.5 billion.

OMB's 1987 PRA decision did not affect the core requirements of the HCS, and addressed only those situations where the hazard communication objectives could be achieved by less burdensome means. As OMB pointed out in a April 13, 1988, letter extending approval of the HCS, OMB approved the key components of the HCS, representing 54 million hours of paperwork, despite an extensive record of industry comments asking OMB to disapprove the HCS in its entirety. OMB sided with the AFL-CIO in determining that "the confusion and potential paperwork duplication...do not, on balance, outweigh the value of putting into effect the key components of the standard."

Moreover, OMB's instructions that OSHA develop, in consultation with the SBA, a compliance assistance program to alleviate HCS paperwork burdens and costs for employers has not been criticized. Apparently, this was a desirable outcome of the PRA review. OSHA did work with SBA to develop an assistance program and completed it in September 1988. OMB estimated that the assistance program would reduce start-up paperwork burdens by 19 million hours in the first year alone.

In addition, in compliance with OMB's instructions, OSHA published in August 1988 an NPRM to consider less burdensome paperwork alternatives. This rulemaking should yield information that will enable OSHA to devise alternatives that protect workers with less paper.

These actions -- disapproval of unjustified paperwork provisions, provison of a compliance assistance program for the public, and initiation of a rulemaking to consider less burdensome alternatives -- flowed directly from the public participation process established by the PRA. We think they are good results. As a result, paperwork burdens will be simplified and reduced with no loss in worker protection.

Title: Grain Dust

Significance: Several large grain dust explosions in grain-handling facilities in 1976 and 1977 killed more than 60 people. As a result, OSHA determined that a standard was necessary to mitigate the hazards of fires and explosions in these facilities, which included grain elevators, and grain and feed mills. In 1987, OSHA published a final standard amid intense criticism over the ten-year delay and OMB's involvement.

The Charges: OMB met secretly with trade associations, seriously weakened the rule by "insisting that the regulation exempt mills and allow grain elevator operators to choose their own method for reducing the problem," and delayed issuance of the final rule for five years. Meanwhile, "there has been no reduction in the rate of deaths and injuries in recent years."

The Factual Inaccuracies: First, while OMB did meet on three occasions with representatives of both industry and organized labor during its review of the proposal, all materials from these meetings were placed in the public record. The meetings were hardly "secret." Second, while OMB review of the NPRM and the final rule was lengthy, totalling about 18 months, the major source of delay was the sheer size of the public record. Over 4,000 public comments were received on the NPRM, resulting in one of the largest public records in OSHA history. Finally, the number of fatalities caused by grain dust explosions has dropped dramatically in recent years, reaching zero in CY 1987.

Rebuttal: The draft proposal would have required grain facilities to install costly engineering controls to remove grain dust from the grain stream, which OSHA's analysis showed would have closed down many country elevators in rural communities throughout the country. At the same time, OMB believed that OSHA had overstated the risks of explosions, particularly in the small elevators. As a result of OMB review, the NPRM published in 1984 was substantially more flexible, allowing elevator operators to choose from three options for controlling grain dust accumulations. OMB subsequently submitted extensive comments and analysis to the public record arguing that the NPRM was ill-suited for feed mills and country elevators. The final rule, published in 1987, deleted these options, but was more flexible than the original draft proposal.

As for the conduct of OMB's review, criticism of OMB's "off-the-record" review do not mention OMB's 1984 comments and recommendations filed in the public rulemaking record. OMB's conclusion in these comments that OSHA had overstated the risks was borne out by the continuing, dramatic decline in explosion-related fatalities through 1985-1987.

The courts have completely rejected a union challenge to OMB's regulatory review of the grain standard. The U.S. Court of Appeals for the Fifth Circuit decided in October 1988 that "There is no merit to the...union claim that OMB has obstructed judicial reviews by this court by means of its alleged off-the-record coercion of OSHA," and referred to the union's "colorful tale" of OMB's involvement. In addition, the court subsequently held that the Occupational Safety and Health Act did permit OSHA to use benefit-cost analysis in developing the grain standard, as well as other safety standards, which was the analytical approach taken by OMB.

Title: Commercial Diving Standards

Significance: Commercial diving is an extremely hazardous profession. In 1977, OSHA adopted a diving standard requiring medical surveillance, equipment maintenance and decompression chambers. The rule was identified for review by the Task Force in 1981. In 1982, OSHA strengthened the standard, but exempted research activities from its scope.

The Charges: The Task Force "recommended review and rescission" of the standard. Boyden Gray met secretly with firms employing divers. "Congressional pressure" forced the Task Force to agree to OSHA's strengthening of the standard.

The Factual Inaccuracies: The Task Force recommended review of the diving standards in 1981, not for "rescission", but to improve its cost-effectiveness. Furthermore, OSHA had already begun a review of the rule in 1979 by issuing an advance notice of proposed rulemaking.

Rebuttal: It is appropriate to engage in ex post review of standards where there is reason to believe that they could be improved. This was such a case and, as Public Citizen points out, it was improved.

Title: Maximum Speedometer Display

Significance: In 1978, NHTSA issued a rule to limit the top speeds displayed on all vehicle speedometers to 85 mph and 140 kilometers per hour. NHTSA revoked this rule in 1982 because of a lack of data on the effectiveness of this maximum speed display requirement.

Rebuttal: The 1978 regulation had not changed the capability of vehicles to operate at speeds higher than 85 mph. It was premised on the assumption that drivers, particularly young drivers, would be less tempted to push vehicles to their physical limits if deprived of the ability to measure speeds above 85 mph accurately. NHTSA had no human behavior or other studies to support this assumption.

There is also no evidence that NHTSA's decision to revoke the 1978 rule had any adverse impact on safety.

Title: Bumpers

Significance: The Motor Vehicle and Cost Savings Act required a bumper standard which achieved "the maximum feasible reduction in costs to the consumer" in low-speed collisions. To meet this requirement, NHTSA had developed a standard that protected automobiles from crashes at speeds up to 5 miles per hour (mph).

Rebuttal: In 1981, NHTSA completed a cost-benefit analysis showing that the 5 mph bumpers were costing consumers more than they were worth. Based on this analysis, the agency modified the standard to require front and rear bumper protection at speeds of 2 1/2 mph, a decision upheld by a Court of Appeals ruling. DOT estimated savings of $300 million annually due to lower vehicle prices, reduced fuel consumption, and lower repair costs for accidents at speeds above 5 mph. Many manufacturers have continued to produce cars with 5 mph bumpers voluntarily, thus enabling consumers who place a higher value on these bumpers to purchase them.

Title: Air Bags and Automatic Safety Belts

Significance: This controversial standard requires automobiles to be equipped with passive restraints (air bags or passive seat belts) that would protect occupants passengers automatically in crashes of up to 30 miles per hour. The concept has been around since 1968 and is now generally accepted by the industry. During the 1970's and early 1980's, however, the costs and benefits of passive restraints were fiercely debated. The Reagan Administration first delayed the passive restraints requirement for one year, then rescinded it. (The rule was to have been effective in phases, starting October 1981.) The Supreme Court reversed DOT's recision decision. DOT then conducted a rulemaking and issued a rule that differed from the previous version in two key respects.

Rebuttal: First, as Public Citizen notes, the new rule had a later effective date due to the intervening rulemakings and court challenges. Second, the new rule contained an important provision under which the passive restraints requirement would be rescinded automatically if States representing two-thirds the U.S. population were to enact mandatory seat belt use laws by April 1989. As a result of this provision, U.S. automobile manufacturers lobbied actively for the passage of such laws. Many States adopted them, leading to an increase in belt usage that appears likely to have produced a long-term improvement in occupant safety.

Title: Tire Quality Grading -- Treadwear

Significance: NHTSA's uniform tire quality grading standards (UTQGS) require tire manufacturers to grade their tires for traction, temperature resistance, and treadwear. In 1983, NHTSA decided that the variability in treadwear test results and in grade assignment practices of the tire manufacturers were providing inaccurate, misleading information to consumers. Because the assigned treadwear grades could, in many instances, incorrectly rank the performance of different tires, NHTSA suspended the treadwear portion of its UTQGS rule. In 1984, the Court of Appeals vacated NHTSA's suspension of the treadwear grading requirement.

Rebuttal: Public Citizen implies that the suspension of the treadwear grading requirement led to a loss in safety performance. However, the treadwear portion of NHTSA's rule is not primarily safety-related. It is designed to provide consumers with information on how long a tire is likely to last, compared to other tires available for purchase. Two components of the UTQGS rule -- traction and temperature resistance -- measure important tire safety functions, but at no time did NHTSA suggest relaxing these requirements. In January 1989, NHTSA issued a Notice of Proposed rulemaking that would assure greater reliability of grading information to consumers. Final action is expected in March 1990.

Title: Pedestrian Safety

Significance: In 1981, NHTSA proposed a pedestrian safety standard to reduce the severity of lower leg and knee injuries in adult pedestrians hit by a passenger car. The NPRM also was intended to provide protection to children hit by a car.

Rebuttal: Research supporting NHTSA's 1981 proposal was performed on a 1978 Pontiac LeMans, which has a front end that is not representative of today's vehicles. The front end of cars has changed dramatically since the 1970's and is now more sloping than vertical. Based on the public comments to the 1981 NPRM, NHTSA changed the focus of its research to head injuries, which are the principal type of serious injury sustained by pedestrians. The agency has also conducted additional research aimed at reducing trauma to an adult pedestrian's head when it hits a car's hood. Based on this research, NHTSA expects to issue of new Notice of Proposed rulemaking in March 1990.

Title: Motor Vehicle Fuel Economy Standards (CAFE)

Significance: The Energy Policy and Conservation Act of 1975 (EPCA) established corporate average fuel economy (CAFE) standards for cars of 18, 19, and 20 miles per gallon (mpg) for model years 1978-1980, leading to a 27.5 mpg standard for 1985 and the following model years. However, section 502(a)(4) of EPCA also authorizes the DOT Secretary to raise or lower the automobile CAFE to the "maximum feasible" level for model 1985 and any subsequent model year. Under this authority, NHTSA lowered the 1986-1988 passenger car standard to 26.0 and the 1989 standard to 26.5 mpg. In October 1988, the agency also proposed to lower the 1990 automobile CAFE standard.

Rebuttal: NHTSA's decision to lower the 1986-1989 CAFE standards has had the effect of reducing economic distortions in the market and ensuring that U.S. manufacturers are not placed at a competitive disadvantage due to the CAFE program. While some U.S. manufacturers have had difficulty in meeting CAFE requirements, the average fuel economy for all cars sold in the U.S. now exceeds the 27.5 mpg statutory goal. In May 1989, NHTSA terminated its proposed rulemaking to lower the 1990 standard, and the statutory standard of 27.5 is in effect for model year 1990.

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March 28, 1990

Honorable John Glenn
Honorable Jeff Bingaman
U.S. Senate
Washington, D.C. 20510

Dear Senators Glenn and Bingaman:

Two days ago I received a copy of a document entitled "Review of Allegations of OMB Interference," which makes reference to selected OMB Watch materials. The document is not on letterhead, but I understand that the Office of Management and Budget has circulated it to Committee members.

We have two significant problems with the document. First, it gives a false overall impression of OIRA review of agency information collection and regulatory activities. Second, the document is factually misleading.

I. Overall Assessment of OIRA Review

The document implies that whatever abuses existed in the past, OIRA review of agency activities (paperwork and regulations) has improved – that it is fair, reasonable, accountable, and accessible, especially since the implementation of the 1986 *Gramm Memo*. The fact remains, however, that now, just as in the past, OIRA review of agency information collection and regulatory activities is:

- **Intrusive** – OIRA review displaces discretion delegated to agencies by Congress;
- **Unreliable** – OIRA review is political and not grounded in fact or technical merit; and
- **Unaccountable** – OIRA review is hidden from public, congressional, and judicial scrutiny.

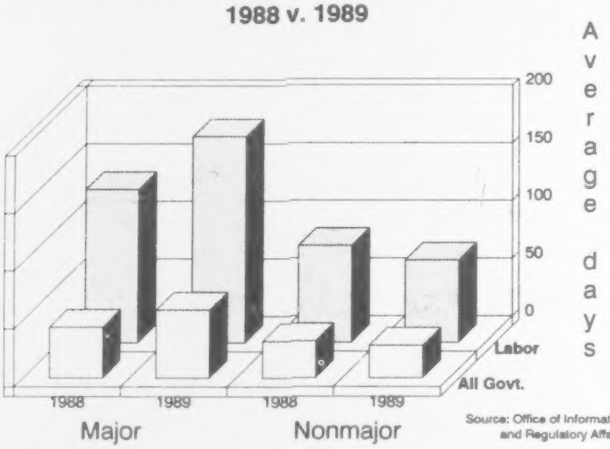
Intrusiveness

OIRA review was and is intrusive. After 1986, as before, congressional committee hearings and reports have chronicled OIRA's continuing interference with substantive agency decision-making. Even the unattributed "Review of Allegations of OMB Interference," which quibbles over dates and disputes specific details, paints the same picture of an OIRA deeply involved in agency decision-making.

OIRA's use of delay has been and remains a major concern. During testimony and discussions over the last year, OMB officials have made clear that they will no longer use delay as a means for influencing agency decisions. Yet OMB data paints a different picture. For all government submissions, OIRA reviews of major regulations under E.O. 12291 averaged 44 days in 1988; but that figure jumped to 59 days in 1989. It is true, however, that the average review time of nonmajor regulations dropped slightly from 32 days in 1988 to 28 days in 1989.

As the graph below shows, delay is a major problem in selected agencies, such as the Department of Labor. The average review time for major regulations from DoL was three times that for regulations government-wide in 1988 and more than that in 1989. The same is true for nonmajor regulations from DoL.

OIRA regulatory delays at Dept. of Labor
1988 v. 1989



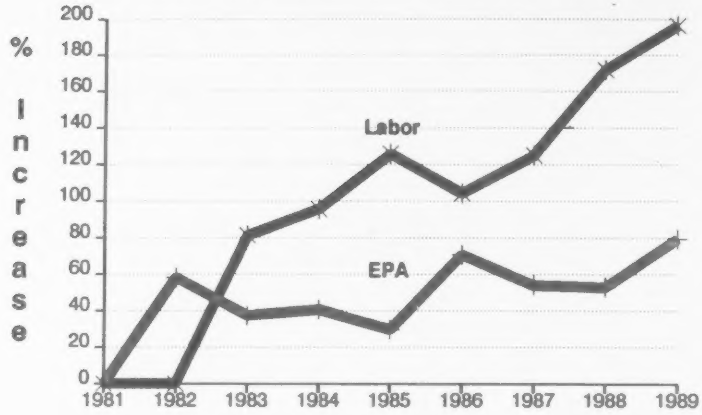
Source: Office of Information and Regulatory Affairs

Historically, the problem of delay is mounting – even under the new Administration. The table and chart below provide a more complete picture of the problem. Since 1986, the the average review time government-wide has increased 20.8%; since 1981, it has more than tripled. While the average review time government-wide has dropped slightly between 1988 and 1989, the difference between the review time for DoL and EPA, on the one hand, and the government-wide average, on the other hand, has steadily widened since 1986. In 1986, it took 25 days longer on average for OIRA to review DoL rules than all government regulations; in 1988, it took 55 days longer; and in 1989, it took 57 days longer – nearly triple the government-wide average. The same trend is true for EPA.

OIRA Regulatory Delays: 1981-89
Average Number of Days for OIRA Reviews

	'81	'82	'83	'84	'85	'86	'87	'88	'89
All Govt.	9	12	16	22	27	24	24	32	29
Labor	9	12	29	43	61	49	54	87	86
EPA	9	19	22	31	35	41	37	49	52
Difference from "All Govt."									
Labor									
Days	0	0	13	21	34	25	30	55	57
%	0.0%	0.0%	81.3%	95.5%	125.9%	104.2%	125.0%	171.9%	196.6%
EPA									
Days	0	7	6	11	8	17	13	17	23
%	0.0%	58.3%	37.5%	40.9%	29.6%	70.8%	54.2%	53.1%	79.3%

OIRA Regulatory Delays: 1981-89
% Increase Over Govt-Wide Avg Delays



OMB Watch has now analyzed OIRA regulatory information for the last quarter of 1989 (October - December). At least 29 regulations reviewed by OIRA during that quarter languished at OIRA for over 90 days (see Attachment A). One fifth of those sat at OIRA for twice that long – that is, at least 180 days. EPA had the most – eight. These numbers only reflect the delay for those regulations OIRA has already reviewed; as you know, the public cannot obtain any information about regulations OIRA has not yet acted on.

Unreliability

OIRA review was and is unreliable. In the fall of 1989, two reports gave a strikingly similar assessment of of OIRA's paperwork clearance process. GAO, in *Paperwork Reduction: Mixed Effects on Agency Decision Process and Data Availability* (PEMD-89-20, September, 1989), and OMB Watch, in our report, *Playing the Numbers: OMB and Paperwork Reduction* (October, 1989), described a process in which:

- OIRA desk officers lack expertise to review the activities assigned to them;
- Procedures are applied inconsistently across programs;
- Decisions are often based on conduit communications and/or unsupported political judgments; and
- OIRA review has a disproportionate impact on a narrow range of programs (i.e., health and safety protection).

Inaccessibility and Unaccountability

Finally, OIRA review was and is inaccessible and unaccountable. The 1986 procedures simply did not improve matters significantly, if at all. For example:

- Just in the last month, an OIRA desk officer responded to a request for regulatory review documents from an attorney with the statement that she knew nothing of the 1986 *Gramm Memo* procedures. When given a copy of the memo by the attorney and OMB Watch, she granted its existence, but indicated the requester would have better luck getting more documents using the Freedom of Information Act;

- According to OIRA, it held the following telephone calls and meetings with the public concerning regulations under review from four electing agencies – HUD, Labor, Transportation, and Treasury – and EPA:

	Meetings	Calls
1989	3	0
1988	0	0
1987	3	10
1986	4	1

This is a curious set of numbers. Apparently no one has called OIRA regarding a regulation from these five agencies since 1987.

- Documents from the Regulatory Planning Process have never been compiled or organized in a manner to permit meaningful review of the E.O. 12498 process: no file organization, no dates on documents, no indication of OIRA review comments or decisions (and no publication at all of the *Regulatory Program* in 1989);

- Sometime in early 1989, OIRA began using a new regulatory review decision category, called "suspension." A suspension allows OIRA to stop the clock until an agency responds to its concerns (and thus confuses the issue of delay in OIRA regulatory review).

A suspension also evades OIRA's own recordkeeping system. While total suspension statistics are available, records of individual suspensions do not appear on the monthly regulatory review action list. Moreover, the required letter to the agency head explaining the suspension is often not in any public file.

These issues, all of which have been brought up in hearings before the Committee on Governmental Affairs, combine to paint a picture of OIRA review that is far different from the rosy scenario OMB would have you believe.

II. The Factual Record on OIRA Review

The unattributed "Review of Allegations of OMB Interference" is striking also for what it does and does not say:

(1) Many of its statements are misleading, providing only partial information about the 29 case studies. For example, on the National Survey of Health and Sexual Behavior, the document states that "HHS made the decision to withdraw the survey re-

quest..." It does not describe that OMB telephoned HHS to ask for additional materials and instructed HHS to submit such information on an SF-83 form. By submitting the information on the form, OMB was free to log-in the additional material as a "new" submission and record the previous submission as withdrawn. Most important, that extended the review beyond the legislatively mandated 90-day time limit. Other problems with the content of the document remain.

(2) The document is conspicuously missing many important details. For example, the document does not address several examples OMB Watch and others raised at hearings on reauthorization of the Paperwork Reduction Act. The most glaring omission is any discussion of OIRA's interference with the dress rehearsal for the decennial census, for which OMB Watch prepared a detailed chronology as part of its testimony. Senator Sarbanes also testified before the House and the Senate about OIRA interference in the decennial census.

Other examples of specific OIRA review decisions – for paperwork and regulations – missing from the document follow. The list is not exhaustive, but illustrative of the document's lack of completeness.

Three Paperwork Examples Used by OMB Watch Not Covered By Document

Dress Rehearsal for the 1990 Decennial Census

Department of Commerce, Census Bureau
Summer, 1987/Spring, 1988

OIRA "raised questions" about one third of the questions on the dry run for the 1990 Census, and many of those questions involved housing quality, important for assessing low-income housing needs. OIRA also waited until late in the process to raise the questions, even though a member of its staff had chaired a federal advisory council charged with designing the Census for three years.

After a joint congressional hearing and 1,000 public comment letters (only 10 of which supported OIRA position), OIRA continued to insist that the Bureau delete and change questions, move questions from the short to the long form, and change the sampling strategy for the dress rehearsal. Nearly six months later, OIRA relented partially. But OIRA's actions guaranteed that the Bureau had wasted time and money (on computer processing plans that it would never use, for example) because of the difference between the dress rehearsal and the actual Decennial Census.

Carpets & Rugs and Broadwoven Fabrics

Department of Commerce, Census Bureau
February, 1988

OIRA disapproved these two quarterly textile surveys because it said the Census Bureau lacked the authority to make them mandatory, despite congressional intent to the contrary. OIRA staff also actively sought out industry representatives to criticize the surveys despite industry support for them.

1987 Charter, Rural, and Intercity Bus Survey

Department of Commerce, Census Bureau
May, 1988, and March, 1989

OIRA thought the survey should be voluntary, although industry trade associations expressed the need for its mandatory nature. OIRA disapproved the survey twice, taking a total of nearly six months to do so. In effect, OIRA's action stymied the Commerce Department's first effort to gather more information on service industries in the United States, part of a major effort to beef up the leading economic indicators.

Three Regulatory Examples Used by OMB Watch Not Covered By Document

Disease-Specific Health Claims on Food Labels

Food & Drug Administration
Proposed rule and advance notice of proposed rule

First submitted for OIRA review in 1987; OIRA revised to allow food manufacturers greater latitude. FDA submitted more restrictive final rule to OIRA on September 19, 1988. OIRA extended review September 27, 1988; OIRA "suspended" review July 14, 1989. FDA issued a new ANRPM, in August, 1989, effectively putting its work back at square one. OIRA backed off in light of congressional and public pressure over the issue and allowed FDA to publish a re-proposed rule – similar to the 1987 proposal – in February, 1990.

Occupational Exposure to Bloodborne Diseases

Occupational Safety and Health Administration
Proposed rule and regulatory paperwork

OIRA changed the wording of an advance notice of proposed rulemaking (ANPRM) in 1987. Proposed rule went for OIRA review in mid-December, 1988; OIRA approved it in May, 1989. OIRA disapproved the proposed rule's information collection requirements in July, 1989.

Verified Residue Control Program

Food Safety and Inspection Service
Proposed rule and regulatory paperwork

Proposed rule and paperwork went to OIRA for review in September, 1989. Review suspended in December, 1989; paperwork withdrawn in December. The proposal would have tightened restrictions on the use of claims, such as "natural," on beef and poultry products and better ensured their accuracy.

OIRA Interference

Not only has OMB Watch and Public Citizen documented repeated abuses by OIRA, but other researchers and numerous Congressional committees have also. While by no means a comprehensive list of hearings that chronicled OIRA interference, the below list does show there have been repeated problems since 1986.

FDA's Regulation of Health Claims on Food Labels, Hearing before the Subcommittee on Human Resources and Intergovernmental Relations, Committee on Government Operations, U.S. House of Representatives, October 31, 1989

Office of Management and Budget Censorship of Federal Employees, Hearing before the Subcommittee on the Civil Service, Committee on Post Office and Civil Service, House of Representatives, May 17, 1989, Serial No. 101-8

The Superfund National Contingency Plan: Report on a Case Study of OMB Involvement in Agency Rulemaking, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, March 1989, Comm. Prt. 101-B

"Oversight of the Occupational Safety and Health Act," Hearing before the Committee on Labor and Human Resources, U.S. Senate, April 18, 1988

Disease-Specific Health Claims on Food Labels: An Unhealthy Idea, Committee on Government Operations, U.S. House of Representatives, April 4, 1988

OMB Proposal for Severe Cuts in the 1990 Census, Hearing before the Joint Economic Committee, U.S. Congress, August 7, 1987, S. Hrg. 100-603

FDA's Regulation on Carcinogenic Additives, Hearing before the Subcommittee on Human Resources and Intergovernmental Relations, Committee on Government Operations, U.S. House of Representatives, June 24, 1987

Review of IRS W-4 Form, Hearing before the Subcommittee on Federal Spending, Budget, and Accounting, Committee on Governmental Affairs, U.S. Senate, March 6, 1987

OMB Review of CDC Research: Impact of the Paperwork Reduction Act, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, October 1986, Comm. Prt. 99-MM

Occupational Health Hazard Surveillance: 72 Years Behind and Counting, Committee on Government Oeprations, October 8, 1986, H. Rpt. 99-979

National Institute for Occupational Safety and Health Oversight: OMB Involvement in VDT Study, Hearing before the Subcommittee on Health and Safety, Committee on Education and Labor, U.S. House of Representatives, June 4, 1986, Serial No. 99-128

Office of Management and Budget Influence on Agency Regulations, Committee on Environment and Public Works, U.S. Senate, May 1986, S. Prt. 99-156

Office of Management and Budget: Evolving Roles and Future Issues, Committee on Governmental Affairs, U.S. Senate, February 1986, S. Prt. 99-134

Oversight of the Office of Management and Budget Regulatory Review and Planning Process, Hearing before the Subcommittee on Intergovernmental Relations, Committee on Governmental Affairs, U.S. Senate, January 28, 1986, S. Hrg. 99-839

If we can be of further assistance, please let me know.

Sincerely,

Gary D. Bass

Gary D. Bass
Executive Director

ATTACHMENT A

Regulations Under OIRA Review for Longer than 90 Days

October-December, 1989

Department of Agriculture

Food Stamp Program: Automated Data Processing Equipment and Services: Conditions for Federal Financial Participation (Final) (298 days) (12/89)

Intermediary Relending Program (NPRM) (106 days) (10/89)

Prepayment of Rural Electrification Administration Guaranteed Federal Financing Bank Loans (Final) (119 days) (ultimately withdrawn from review) (12/89)

Department of Defense

Shoreline Management at Civil Works Project (168 days) (Final rule) (10/89)

Department of Energy

Federal Energy Management and Planning Programs Methodology and Procedures for Life Cycle Cost (NPRM) (156 days) (11/89)

Department of Health and Human Services

Automatic Data Processing Equipment and Services: Guidelines for Federal Financial Participation (Final) (307 days) (12/89)

Data, Standards, and Methodology Used to Establish Budgets for Fiscal Intermediaries and Carriers (Final rule) (92 days) (10/89)

National Practitioner Data Bank for Adverse Information on Physicians and Health Care Practitioners (Final Rule) (254 days) (10/89)

Department of Housing and Urban Development

Income Verification Procedures for Applicants and Participants in HUD Programs (NPRM) (103 days) (10/89)

Department of the Interior

Sales of Forest Products, General; Preparation for Sale; Award of Contract; Sales Administration; Trespass (NPRM) (97 days) (11/89)

Onshore Oil and Gas Operations – Federal and Indian Oil and Gas Leases – Onshore Oil and Gas Order No. 7 (NPRM) (135 days) (12/89)

National Park Service, Vehicles and Traffic Safety (Final) (125 days) (12/89)

Department of Justice

Aliens and Nationality, Asylum and Withholding of Deportation Procedures (Final rule) (271 days) (10/89)

Department of Labor

Examinations & Tests of Electrical Equipment (NPRM) (147 days) (10/89)

Department of Transportation

Bridge Safety Rules (NPRM) (174 days) (10/89)

Determination of Fair and Reasonable Rates for the Carriage of Bulk and Packaged Cargoes on U.S. Flag Commercial Vessels (Final rule) (97 days) (11/89)

Department of the Treasury

Collective Investment Funds Plan/Financial Report (NPRM) (94 days) (12/89)

Returns Relating to Perso[illegible]ving Contracts from Federal Executive Agencies (Final rule) (261 days) (10/89)

Environmental Protection Agency

CERCLA Compliance with Other Laws Manual, Part II (NPRM) (146 days) (12/89)

Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines, Certification Procedures (Final rule) (99 days) (11/89)

Corrective Notice and Reproposed Liner/Leak Detection Rule (NPRM) (223 days) (11/89)

Evaporative Emissions Regulations for Gasoline and Methanol Fueled Light-Duty Vehicles, Light-Duty Trucks, and Heavy Duty Vehicles (NPRM) (168 days) (11/89)

Guidance on Metals and Hydrogen Chloride Controls for Hazardous Waste (NPRM) (119 days) (12/89)

Guidance on PIC Controls for Hazardous Waste Incinerators (NPRM) (116 days) (12/89)

Pharmacokinetics Text Standard and Amended (Final rule) (93 days) (10/89)

Proposed Amendment to Hazardous Waste Incinerator Standards (NPRM) (119 days) (12/89)

Equal Employment Opportunity Commission

Federal Sector Equal Employment Opportunity (NPRM) (125 days) (10/89)

General Services Administration

Implementation of Second Phase of the FIRMR Improvement Project (NPRM) (94 days) (10/89)

Small Business Administration

Disaster – Physical Disaster and Economic Injury Loans (NPRM) (105 days) (12/89)

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PETER SMITH, VERMONT
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ONE HUNDRED FIRST CONGRESS
Congress of the United St[illegible]
House of Representatives
HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-372
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STATEMENT OF THE HONORABLE TED WEISS, CHAIRMAN

BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

S. 1742

TO REAUTHORIZE THE PAPERWORK REDUCTION ACT AND THE
OMB OFFICE OF INFORMATION AND REGULATORY AFFAIRS

FEBRUARY 21, 1990

SENATOR GLENN, I WANT TO FIRST THANK YOU FOR PROVIDING ME THE OPPORTUNITY TO APPEAR BEFORE YOU AND THE COMMITTEE AND TO APPLAUD YOUR LEADERSHIP ON THIS VERY IMPORTANT ISSUE. I BELIEVE THAT THE REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT PROVIDES A UNIQUE OPPORTUNITY TO REDUCE ONE OF THE SERIOUS ABUSES IN GOVERNMENT -- THE OVERZEALOUS "REGULATORY REVIEW" ACTIVITIES OF OMB'S OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA).

I ALSO WANT TO ACKNOWLEDGE THE IMPORTANT LEADERSHIP OF SENATOR BINGAMAN, BOTH FOR HIS AUTHORSHIP OF THE LEGISLATION NOW UNDER CONSIDERATION BY THIS COMMITTEE, AND FOR HIS RECOGNITION OF THE PROBLEM WHICH BRINGS ME HERE, TODAY, THE NEED FOR A STRONG "REGULATORY REVIEW" PROVISION IN THIS BILL.

I BELIEVE THAT A LEGISLATIVE SOLUTION IS DESPERATELY NEEDED TO MAKE OMB MORE ACCOUNTABLE TO CONGRESS AND THE PUBLIC, AND I HAVE THUS INTRODUCED LEGISLATION IN THE HOUSE TO ACCOMPLISH THAT GOAL. I WILL SUBMIT A COPY OF MY BILL, H.R. 3314, FOR THE RECORD.

THE HOUSE SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS, WHICH I HAVE THE PRIVILEGE TO CHAIR, HAS DOCUMENTED NUMEROUS INSTANCES WHERE OMB HAS INTERFERED WITH THE DECISIONMAKING PROCESS IN AREAS SUCH AS FOOD SAFETY, THE DRUG APPROVAL PROCESS, FOOD LABELING, AND WORKPLACE SAFETY.

MY SUBCOMMITTEE IS NOT ALONE IN REVEALING OMB'S TAMPERING WITH THE REGULATORY PROCESS. A LIST OF CASES OF OMB MEDDLING WITH THE ACTIONS OF THE ENVIRONMENTAL PROTECTION AGENCY, THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, AND OTHER HEALTH AND SAFETY AGENCIES CAN BE OBTAINED FROM A VARIETY OF COMMITTEES AND SUBCOMMITTEES IN THE HOUSE AND THE SENATE.

CONGRESS HAS PASSED HEALTH AND SAFETY LAWS, AND DELEGATED IMPLEMENTATION OF THOSE LAWS ONLY TO THE SPECIFIC AGENCIES WITH EXPERTISE IN THE RELEVANT SUBJECT MATTER. OMB HAS NO STATUTORY RIGHT TO ALTER THE DECISIONS OF THE AGENCIES EMPOWERED BY CONGRESS TO PROTECT THE PUBLIC'S HEALTH. IN MY VIEW, OMB'S SO-CALLED "REGULATORY REVIEW" ACTIVITIES OVER THE LAST EIGHT YEARS ARE ALMOST CERTAINLY ILLEGAL.

PERHAPS THE MOST TROUBLING ASPECT OF OMB'S REVIEW OF REGULATIONS IS THE MANNER IN WHICH IT TAKES PLACE. BEHIND CLOSED DOORS, NAMELESS AND FACELESS OMB EMPLOYEES -- USING THE POWERS GRANTED THEM NOT BY STATUTE, BUT BY EXECUTIVE ORDER -- HAVE FORCED EXPERT AGENCIES LIKE THE FOOD AND DRUG ADMINISTRATION TO ALTER REGULATIONS. OFTEN THESE ORDERS ARE ISSUED OVER THE PHONE, WITH NO DOCUMENTATION OF THE COMMUNICATION.

LET ME BRIEFLY DESCRIBE A FEW CASES OF OMB INTERFERENCE THAT MY SUBCOMMITTEE HAS UNCOVERED:

COLOR ADDITIVES

THE FIRST CASE INVOLVES THE REGULATION OF COLOR ADDITIVES. IN 1982, FDA WAS PREPARED TO BAN SIX DIFFERENT COLOR ADDITIVES BECAUSE AGENCY SCIENTISTS DETERMINED THAT THE ADDITIVES CAUSED CANCER IN ANIMALS. UNDER A PROVISION OF THE FOOD, DRUG, AND COSMETIC ACT KNOWN AS THE DELANEY CLAUSE, CARCINOGENIC ADDITIVES MUST BE BANNED.

AT THE URGING OF COLOR ADDITIVE MANUFACTURERS, OMB HELD NUMEROUS MEETINGS WITH OFFICIALS OF FDA AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES IN AN ATTEMPT TO PREVENT SOME OR ALL OF THE DYES FROM BEING BANNED. IN A REPORT THAT WAS UNANIMOUSLY APPROVED BY OUR FULL COMMITTEE, WE FOUND THAT:

> OMB'S EFFORTS TO INFLUENCE THE DEPARTMENT'S REGULATIONS OF COLOR ADDITIVES FOUND TO BE ANIMAL CARCINOGENS INTERFERED WITH SCIENTIFIC, PUBLIC HEALTH DECISIONS THAT CONGRESS EXPECTED THE DEPARTMENT AND ITS EXPERTS TO MAKE.

(HHS' FAILURE TO ENFORCE THE FOOD, DRUG, AND COSMETIC ACT: THE CASE OF CANCER-CAUSING COLOR ADDITIVES, H. REP. 99-151, 99TH CONG., 1ST SESS., JUNE 3, 1985, P. 63.)

REGULATION OF THE USE AND SALE OF EXPERIMENTAL DRUGS

MY SECOND CASE CONCERNS THE ALTERATION OF A PROPOSED REGULATION DESIGNED TO EASE RESTRICTIONS ON THE USE AND SALE OF EXPERIMENTAL DRUGS.

IN A 1987 HEARING, OUR SUBCOMMITTEE REVEALED THAT, AT OMB'S INSISTENCE, THE PROPOSED STANDARD OF APPROVAL FOR EXPERIMENTAL DRUGS TO TREAT "LIFE-THREATENING" ILLNESSES WAS DRASTICALLY ALTERED. (FDA PROPOSALS TO EASE RESTRICTIONS ON THE USE AND SALE OF EXPERIMENTAL DRUGS, 100TH CONG., 1ST SESS., APRIL 29, 1987.) PRIOR TO OMB'S INVOLVEMENT, FDA PROPOSED THAT DRUG SPONSORS BORE THE BURDEN OF DEMONSTRATING THAT A DRUG'S BENEFITS OUTWEIGHED ITS RISKS, AND THAT SUFFICIENT EVIDENCE OF SAFETY AND EFFICACY EXISTED.

HOWEVER, OMB ORDERED THAT FDA'S PROPOSED STANDARD BE CHANGED. A NEW PROPOSAL REMOVED THE LANGUAGE REQUIRING SUFFICIENT EVIDENCE OF SAFETY AND EFFICACY. INSTEAD, OMB PLACED THE BURDEN ON FDA TO PROVE THAT THE RISKS POSED BY A DRUG WERE "UNREASONABLE" BEFORE THE AGENCY COULD REJECT AN APPLICATION.

THIS CASE WAS ALL THE MORE TROUBLING BECAUSE THERE WAS NO DOCUMENTATION TO IDENTIFY WHICH OMB EMPLOYEES WERE RESPONSIBLE FOR REJECTING AN FDA PROPOSAL THAT SUFFICIENT EVIDENCE OF A DRUG'S SAFETY AND EFFICACY BE REQUIRED AS A CONDITION FOR APPROVING AN EXPERIMENTAL DRUG. OMB WAS SIMPLY ACTING IN THE DARK.

VIDEO DISPLAY TERMINALS

MY LAST EXAMPLE INVOLVES VIDEO DISPLAY TERMINALS. IN 1982, THE NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH (NIOSH) STARTED PLANNING A STUDY OF THE POSSIBLE HAZARDS OF VIDEO DISPLAY TERMINALS (VDTS) ON PREGNANT WOMEN, IN RESPONSE TO REPORTS OF BIRTH DEFECTS, MISCARRIAGES, STILLBIRTHS, AND OTHER REPRODUCTIVE PROBLEMS. IN 1985, THE STUDY DESIGN WAS COMPLETED, BUT OMB REFUSED TO APPROVE IT.

OMB HAD NO SCIENTIFIC STAFF TO REVIEW THE PROPOSED STUDY, SO ITS CRITICISMS WERE BASED IN LARGE PART ON REVIEWS CONDUCTED BY TWO INDUSTRY CONSULTANTS. NIOSH REVISED THE STUDY AND TRIED TO ANSWER THE CONCERNS RAISED BY OMB. IN JUNE 1986, OMB APPROVED THE STUDY, UNDER THE CONDITION THAT NIOSH DELETE 69 QUESTIONS ABOUT STRESS AT WORK AND FERTILITY. THIS REPRESENTED APPROXIMATELY ONE-THIRD OF THE STUDY.

SCIENTISTS AT NIOSH AND THE OFFICE OF TECHNOLOGY ASSESSMENT STATED THAT THE REVISIONS WOULD SERIOUSLY WEAKEN THE STUDY. NEVERTHELESS, OMB INSISTED THAT ITS REVISIONS BE INCORPORATED. IN SO DOING, OMB IGNORED THE RECOMMENDATIONS IN OUR REPORT (OCCUPATIONAL HEALTH HAZARD SURVEILLANCE: 72 YEARS BEHIND AND COUNTING, H. REP. 99-979, 99TH CONG., 2D SESS., OCTOBER 8, 1986), AND NUMEROUS OTHER OBJECTIONS TO THE OMB REVISIONS.

IN 1988, CALIFORNIA RESEARCHERS REPORTED THAT VDTS MAY BE CAUSING MISCARRIAGES AND BIRTH DEFECTS-- BASED ON THAT STUDY, EXPERTS HAVE ESTIMATED VDTS MAY CAUSE 100,000 MISCARRIAGES EACH YEAR.

MORE RESEARCH IS NEEDED TO CONFIRM THOSE CONCLUSIONS. THE NIOSH STUDY IS STILL NOT COMPLETED. WHATEVER THE RESULTS OF THE NIOSH STUDY, IT WILL BE EXTREMELY DIFFICULT TO DRAW ANY CONCLUSIONS, BECAUSE OF THE DELETIONS FROM THAT STUDY. ANOTHER RESULT OF OMB'S INTERFERENCE IS THE NEED TO VIRTUALLY RE-DO THE ORIGINAL NIOSH STUDY. AND, SO, THE FEDERAL GOVERNMENT IS NOW FUNDING YET ANOTHER VDT STUDY, WHICH IS BEING CONDUCTED BY MT. SINAI MEDICAL CENTER IN NEW YORK.

CONCLUSION AND LEGISLATIVE SUGGESTIONS

WHILE REASONABLE PERSONS MAY DISAGREE OVER THE PROPER SCOPE OF "REGULATORY REVIEW," I HOPE WE CAN ALL AGREE THAT OUR SYSTEM OF OPEN, PARTICIPATORY DEMOCRACY DEMANDS THAT THE PUBLIC BE PROVIDED ACCESS TO THE RECORD OF OMB'S ROLE IN REGULATORY DECISIONMAKING. THE ADMINISTRATIVE PROCEDURE ACT AND FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW DEMAND AS MUCH.

ON SEPTEMBER 19, 1989, I INTRODUCED H.R. 3314, THE "REGULATORY INFLUENCE REPORTING AMENDMENTS OF 1989." THE GOAL OF MY BILL IS TO ASSURE THAT OMB CAN BE HELD MORE ACCOUNTABLE FOR

ITS SUBSTANTIVE ACTIVITIES. MY LEGISLATION CONTAINS FIVE PRIMARY RECOMMENDATIONS. THEY ARE:

1. REQUIRE OMB TO SUMMARIZE IN WRITING ALL ORAL COMMUNICATIONS WITH NON-OMB PERSONS REGARDING ANY REGULATORY ACTIVITY OMB IS REVIEWING OR HAS AN INTEREST IN, WITHIN ONE DAY OF THE COMMUNICATION; REQUIRE THESE WRITTEN SUMMARIES, AND ANY WRITTEN COMMUNICATIONS BETWEEN OMB AND NON-OMB PERSONS, TO BE MADE PUBLICLY AVAILABLE WITHIN THREE DAYS AFTER THE COMMUNICATION IS LOGGED OR RECEIVED.

2. REQUIRE OMB TO MAKE ANY CHANGES OR SUGGESTIONS IT HAS FOR DRAFT REGULATIONS IN WRITING, TOGETHER WITH A JUSTIFICATION FOR THOSE CHANGES, TO BE SIGNED BY THE ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS; REQUIRE THIS WRITING TO BE PUBLICLY AVAILABLE WITHIN THREE DAYS AFTER THE CHANGES ARE SIGNED OFF BY THE ADMINISTRATOR.

3. REQUIRE OMB TO INVITE AN AGENCY TO ANY MEETING OMB HAS WITH ANY NON-OMB PERSON REGARDING ANY REGULATORY ACTIVITY OF THAT AGENCY UNDER REVIEW.

4. REQUIRE EACH AGENCY TO PLACE IN THE RULEMAKING RECORD THE DRAFT OF EACH RULE OR REGULATION SUBMITTED TO OMB FOR REVIEW, ALONG WITH A COPY OF ANY CHANGES OR SUGGESTIONS MADE BY OMB; ALSO REQUIRE EACH AGENCY TO MAKE A WRITTEN SUMMARY OF ANY ORAL COMMUNICATIONS WITH OMB AND PLACE THOSE SUMMARIES ON THE RULEMAKING RECORD.

5. LIMIT THE TIME FOR OMB REVIEW OF REGULATIONS TO 30 DAYS AND ORDER THE PUBLICATION IN THE FEDERAL REGISTER OF ANY REGULATION IF THE 30-DAY PERIOD FOR REVIEW EXPIRES WITHOUT OMB ACTION.

I UNDERSTAND THAT THE "REGULATORY REVIEW" PROVISION IN SENATOR BINGAMAN'S LEGISLATION DIFFERS FROM MY BILL. THE IMPORTANT POINT IS THAT BOTH BILLS STAND FOR THE PROPOSITION THAT THE CONGRESS MUST ADDRESS THIS MATTER BY ENACTING A STATUTORY CHANGE THAT IMPOSES BINDING LEGAL OBLIGATIONS ON OMB.

I WOULD LIKE TO RESPECTFULLY SUGGEST TWO AMENDMENTS TO S. 1742 THAT YOUR COMMITTEE MIGHT WANT TO CONSIDER. FIRST, I THINK IT IS IMPORTANT THAT OMB BE REQUIRED TO MAKE WRITTEN MEMORANDA OF ANY ORAL COMMUNICATIONS RELATED TO A REVIEW OF A REGULATION, AND THAT THOSE MEMORANDA BE PUBLICLY AVAILABLE. SECOND, THERE SHOULD BE A SPECIFIED TIME PERIOD IN WHICH OMB MUST PLACE WRITTEN MATERIALS IN THE PUBLIC FILE.

UNDER YOUR LEADERSHIP, MR. CHAIRMAN, I AM CONFIDENT THAT THE CONGRESS WILL ENACT LEGISLATION THAT GOES A LONG WAY TOWARD MAKING OMB ANSWERABLE TO THE AMERICAN PEOPLE.

United States General Accounting Office

GAO

Testimony

For Release
on Delivery
Expected at
10:00 a.m. EST
Wednesday
February 21,
1990

Federal Information Resources Management Act (S. 1742)

Statement of
Milton J. Socolar, Special Assistant to the
Comptroller General

Before the
Committee on Governmental Affairs
United States Senate

GAO/T-IMTEC-90-3

GAO Form 160 (12/87)

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss S. 1742--the Federal Information Resources Management Act of 1989 (S. 1742, 101st Cong., 1st Sess. (1989)). The purpose of the bill is to further the goals of paperwork reduction and to provide for comprehensive information resources management (IRM) of federal departments and agencies. It reauthorizes the Paperwork Reduction Act of 1980 and is designed to reduce the burden of duplicative government paperwork for business, educational institutions, and individuals; to improve the information infrastructure and statistical data base of the federal government; to set a national information resources management policy, including the improvement of public access to government information; and to improve the efficiency and effectiveness of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).

We support the bill's thrust towards continuing to reduce the burden of federal paperwork and initiating changes in the way information is managed in the federal sector. The complexity and cost of federal information systems--billions of dollars every year--along with the technological challenges facing the nation over the next few years call for such changes and for strong leadership on the part of both Congress and the agencies.

I would like to comment briefly on a few key provisions of the bill addressed by recent GAO work--the need for information management leadership in the agencies and the paperwork reduction responsibilities of OMB. While to date we have little completed

GAO work in other critical areas included in this legislation--statistical policy, information dissemination, and public access, we have established a new issue area in GAO on "Government Information and Statistics" which will provide broader coverage of these topics in the future.

Role of the Chief Information Resources Management Official

Federal agencies are facing a crisis in managing their information resources. For example, in testimony before your Subcommittee on Government Information and Regulation last June,[1] we reported that the government spends about $20 billion each year on information technology. Yet we could not identify a single large systems development project that met each of three important criteria--satisfying user needs, coming in on time, and reasonably meeting original cost estimates. In our report Meeting the Government's Technology Challenge which is being released today,[2] we identified several fundamental principles that government agencies must follow to improve their management of information technology. Development and implementation of information systems should proceed under well-defined plans which provide a clear vision of how information is to be used to further agency objectives. Service to the public should always be a key consideration, and top management within the agency must always be seriously involved in the process.

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[1] Statement of Ralph V. Carlone (GAO/T-IMTEC-89-9; June 12, 1989)

[2] Meeting the Government's Technology Challenge: Results of a GAO Symposium, (GAO/IMTEC-90-23 February 21, 1990).

The establishment of a chief information resources management official at each agency as a career appointee having the necessary qualifications and experience should help agencies better focus on information management. But while this official may seek to promote the effective acquisition, management, and use of information resources, his effectiveness will be dependent to a large extent on the interest, attention, and understanding given to information management by other top agency officials. The bill recognizes this. It promotes greater awareness and understanding of information management by calling for the chief information official to develop and implement formal training programs on IRM concepts (section 3506 (c) (2)), and for the OIRA Administrator to ensure that such training is done (section 3504 (a) (6)). Training for agency program officials is essential and needs to receive a high priority if meaningful progress is to be made.

Need For a Strategic Approach to Information Management

Effective information resources management is essential to carrying out vital national functions. The delivery of these vital services by the government--such as tax processing, air traffic control, and national defense--depends directly on good information management practices, including the effective use of information technology.

In too many instances agencies do not complete strategic IRM plans and develop plans that are not integrated into their mission plans and goals. As a result, millions of dollars are spent on major information systems that do not meet agency needs, do not perform as desired, are not cost effective, and are not compatible with existing or future agency systems.

There are opportunities and challenges for improved program management through IRM, and program managers should be the agencies' front-line information managers in meeting that challenge. Agencies should also be encouraged to incorporate IRM explicitly in their strategic plans and to link these plans to the agency's mission and budget.

The Quality of Public Information

We concur in the central purpose of S.1742: to "ensure the greatest possible public benefit from information collected, maintained, used, disseminated, and retained by the Federal Government." Much of our work in reviewing OMB's approval process for agency data-collection requests focused on achieving the proper balance between minimizing the public's paperwork burden while assuring the best possible quality in the information to be produced. One of our reviews examined changes in the paperwork burden[3] and found some increases, primarily associated with applications for benefits and regulatory and compliance collections. On the other hand, we found little real change in the paperwork burden for business generally. Another report assessed OMB's process for assuring information quality in its forms clearance process.[4] We found problems with both quality and timeliness in this process: reviews were slower than in earlier years, there was a large increase in the number of reviews exceeding the legally authorized time limits, some OMB approved requests were technically flawed, and review policies were inconsistently applied. We concluded that some changes in OMB's procedures could lead to notable improvement in information quality.

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[3] Paperwork Reduction: Little Real Burden Change in Recent Years (GAO/PEMD-89-19FS, June 1989).

Commission on Federal Information

We support the creation of the Commission (section 203) which is designed to study the gathering, processing, analysis, and dissemination of information by the federal government. The weaknesses in OMB's forms clearance process are directly addressed by the Commission's mandate to improve the quality and timeliness of OMB's reviews of agency data collection requests.

However, we feel the Commission's role should be expanded to include examining how well agencies use information internally to manage or to achieve their mission objectives. At the same time, the tasks already laid out for the Commission are so broad that they could not be accomplished in any meaningful way by July 1991. We suggest a later reporting date.

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[4] Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability (GAO/PEMD-89-20, Sept. 1989).

OMB Delegation of Authority

Our recent reports on paperwork reduction also found that some agencies have organized themselves effectively to meet the requirements of the Paperwork Reduction Act and obtain approval for virtually all of their information collection requests without major modifications. We found that the subsequent review of data collection requests by OMB for such agencies was redundant, and we recommended that OMB exercise existing authority to delegate approval to these agencies. OMB could modify or retract its delegation if agency performance declined. OMB has not yet acted upon this recommendation, which we believe would improve the efficiency and timeliness of the forms clearance function. The bill continues to authorize such delegations.

GAO Reviews of OIRA and the Agencies

The requirement in section 110 for a report by GAO, no later than July 1, 1991, on the overall effectiveness and attentiveness of OIRA and the agencies in meeting all of the responsibilities assigned by law, is unnecessary. GAO already has sufficient authority to do such work. Further, if enacted, the requirements of section 110 would draw too heavily on our limited staff resources; we do not believe, in any event, that we could determine the impact of the bill on agency activities in the time specified. In lieu of a specific legislative requirement, it would be preferable for us to work with the Committee to determine matters of greatest concern and concentrate our efforts in those areas.

That concludes my testimony, Mr. Chairman, except that I have attached several technical comments to my statement which are largely directed toward assuring that GAO and other legislative agencies are not subject to authority of the Administrator of General Services or the Archivist. I would be pleased to answer any questions you or the other Committee members might have.

Proposed technical changes to s.1742

1. Page 15, section (d), amending 44 U.S.C. 3504(f). The first word of the new paragraphs (4), (5), and (6) should respectively be "overseeing", "conducting", and "recommending."

2. Page 61, section 301, amending 44 U.S.C. 3302. The law currently directs the Archivist to promulgate regulations establishing records disposal procedures. The proposed amendment would add that the regulations are "binding on all Federal agencies." Because the law currently defines "Federal agency to include . . . any establishment in the legislative . . . branch," it appears that GAO would be bound by the Archivist's regulations. We recommend changing "Federal agencies" to "Executive agencies."

3. Page 63, section (C) (2) amending 44 U.S.C. 2906. Currently, 44 U.S.C. 2906(a)(1), entitled "Inspection of agency records," provides that the Administrator of General Services and the Archivist (or designees), in carrying our their responsibilities under Chapter 29 of title 44:

   > ". . . may inspect the records or records management practices and programs of any Federal agency solely for the purpose of rendering recommendations for the improvement of records management practices and programs . . ."

   The proposed amendment would delete the word "solely," and add:

   > "The Archivist (or his designee) may inspect the records of any Federal agency for the purpose of determining whether records in the custody of the agency have sufficient historical, administrative, legal, research or other value to warrant further preservation by the government."

   We recommend that the words "Federal agency" be changed to "Executive agency".

**Comptroller General
of the United States**

Washington, D.C. 20548

March 26, 1990

The Honorable Jeff Bingaman
Chairman, Subcommittee on Government
  Information and Regulation
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Enclosed are our responses to your additional questions following the Senate Governmental Affairs Committee's hearing on the reauthorization of the Paperwork Reduction Act. If you require additional information, please contact Mr. Jack Brock at 275-3195.

Sincerely yours,

Milton J. Socolar

Milton J. Socolar
Special Assistant to the
  Comptroller General

Enclosures - 2

ENCLOSURE I

QUESTIONS FOR GENERAL ACCOUNTING OFFICE WITNESS

A. INFORMATION RESOURCES MANAGEMENT

1. You testified that the establishment of a Chief Information Official at each agency who will be a career appointee having appropriate qualifications and experience, should help agencies better focus on information management. OMB has testified that it thinks this position should not be a career official. Can you give me your feelings on the effect of this position not being a career official?

   Information resources management needs to be institutionalized in the executive agencies. Our work has shown that most agencies do not effectively use information to carry out their program objectives and that billions of dollars are wasted in developing computer systems that do not meet user needs. A principal cause of this failure is lack of management continuity. A career appointee has the opportunity to provide for that continuity.

2. In your testimony you suggest that the bill "emphasize the opportunities and challenges for improved program management through IRM." Are there additional specific changes you can suggest that should be included in the bill or is it enough to reflect this emphasis in the report language?

   We have no additional specific changes to the bill in this regard. The report language should emphasize that information management is not simply a means to acquire computer hardware or install information systems but provides much of the support necessary for accomplishing an agency's programs and objectives. As such, IRM is a required element in successful program implementation.

3. You state that meeting the information systems challenges facing the nation over the next few years calls for strong leadership both on the part of the Congress and the agencies. But you do not mention OMB.

   a. What is your view of the provisions in the proposed bill for OMB-led interagency groups and advisory committees? Are there alternative mechanisms for coordination and information sharing that should be considered?

   The interagency groups and advisory committees are good mechanisms for getting agency input in the development of information policies, plans, and guidelines. These groups can provide a communications link between OMB and the agencies as well as provide information managers within the agencies an opportunity for exchanging ideas and for comparing experiences and "lessons learned."

b. Do you support the provisions of the bill directed toward ensuring that OMB provide more balanced leadership in developing implementing information policy and guidance?

Yes. Historically, OMB has concentrated its efforts to implement the Paperwork Reduction Act on forms clearance. OMB has played a limited role in working with individual agencies to improve their IRM activities. While responsibility for good information management rests with the individual agencies, OMB can play an important role by providing adequate guidance and oversight to better assure improvement in agency information management activities.

c. Who should have responsibility for ensuring the development of appropriate IRM training programs? Of articulating the professional qualifications required to support IRM?

The Office of Information and Regulatory Affairs in OMB should ensure the development of appropriate IRM training programs as the bill provides (proposed section 3504(a)(6)). However, the Office of Personnel Management is responsible, under OMB Circular A-130, for developing and conducting training programs for federal personnel on IRM. With regard to articulating professional qualifications for IRM, an interagency advisory committee would provide a good means for getting both OMB and the agencies involved in establishing these qualifications.

B. PAPERWORK REVIEW PROCESS

1. I have found the testimony given by Eleanor Chelimsky, Assistant Comptroller General, before the House Science, Research, and Technology Subcommittee on GAO's September 1989 report, "Paperwork Clearance: It's Time for a Change," quite instructive.

a. Can you summarize the findings of that report for us?

The paperwork review process is working reasonably well but could be improved in the following areas:

-- Improvements are needed in the technical quality of the OMB reviews. We studied these reviews in a number of ways, but were especially concerned about the fact that OMB approved 7 of 10 proposed data collections that GAO found to be technically inadequate.

-- While OMB has set up a formal process for reviewing incoming requests for data collection, the actual reviews are conducted informally and inconsistently. We found that informal procedures were used to determine if information requests were duplicative; written technical guidelines were rarely used; and the criteria for determining the priority reviews should be accorded varied among staff.

-- Many agencies have mastered the paperwork review process to the degree that virtually all of their requests are approved by OMB and there are almost no significant modifications in those requests. This means that the OMB review is, in our judgment, redundant; the time and expense associated with it should be saved and the result would be an improvement in the timeliness of paperwork reviews. OMB could monitor the process to ensure that the quality of the reviews was maintained.

-- A copy of the report is enclosed for the record.

b. Which provisions of S. 1742 best address the corrections that findings of your report speak to?

-- The establishment of a Commission on Federal Information (Title II) that will, among other functions, review "problems of quality, timeliness, and the relevancy" of information.

-- The addition of provisions (section 107) for "self-certification," in which agencies may expedite the reapproval of currently approved information collections that are about to expire.

-- The addition of a responsibility for the Administrator to "promote policy research and development in the area of information dissemination as a basis for developing effective guidance for program and policy development in federal agencies." (section 104(e)).

c. What other suggestions do you have for improvements in OIRA's activities not already addressed in S. 1742?

OMB already has the authorization to make the other needed changes we recommended, but has not yet taken action. We think that:

-- OMB should act immediately to delegate primary review responsibility to senior officials within agencies with demonstrated capability to conduct their own reviews.

-- OMB could then turn its main review attention to assisting agencies with less-effective internal means for procedural and technical reviews.

-- However, OMB needs to strengthen its capacity to provide such assistance. We suggested that OMB should take steps such as developing an ongoing technical program for the agency paperwork review staff, and/or hiring more technical staff and consultants.

d. Your report says certain agencies consistently fared well with OIRA while others consistently didn't do well. Which agencies did well and which agencies did not and why do you suppose these outcomes occurred? Is there any issue of the significance of those agencies that did well and those that didn't? And is S. 1742 effective in preventing these delays?

We have prepared a supplement which indicates the performance of each agency submitting information collection requests to OMB in the 1985-87 period and we are providing this supplement to the Committee. (attached)

Our report indicates several factors which may contribute to differences in agency success with OMB. These include the quality of an agency's processes for internal review of proposed information collections prior to their submission to OMB, the number of agency requests which call for new information collections, which are more likely to be disapproved, and differences of opinion between agency and OMB staff about the collection of certain types of information.[1]

With regard to the effectiveness of S. 1742 in preventing these delays, we address that in detail in response to your questions B. 2(a) and B. 2(b) (see pages 7 and 8). The main application is the self-certification provision in S. 1742, whereby agencies can expedite the review of extensions of existing collections. This provision would eliminate some of the redundancy we noted in reviews. That is, we found some agencies able to conduct their own reviews with only broad OMB oversight and the bill mandates such a procedure for certain kinds of collections (renewals). However, it excludes new collections (which these agencies also seem able to process effectively) and includes some other agencies that we did not find able to conduct effective reviews. Of course, one could argue that the risks of inappropriate data collection are substantially less for renewals than for the first time data collections. As we note in the later section, OMB has existing authority that it has not used--and which would be retained by S. 1742--to delegate clearance responsibility to selected agencies.

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[1] Background note: our examples, together with background material we collected for the study, reflect OMB concerns about both information collection methods and about the need for information in certain substantive areas.

e. Time delays were a large concern outlined in your report. Can you discuss these for us?

-- The majority of the information collection requests were reviewed and acted upon by OMB within the time specified in the Paperwork Reduction Act (OMB is allowed 60 days to review submissions and this can be extended to a maximum of 90 days).

-- By the 90th day, 96-99 percent of all reviews are acted upon.

-- However, the median length of reviews increased by 41 percent between the early 1980's and 1987. The number of reviews exceeding 60 days increased 25 percent. These increases occurred almost entirely in 1987.

-- Interviews with desk officers at OMB indicate that the most likely reason for the increases in review time in 1987 was a responsiveness to congressional interest in greater public participation in the clearance process. A notification of intention to collect information is filed in the Federal Register with a 30-day public comment period.

-- However, our interviews also suggest that delaying the reviews for the public comment period is not necessary and one of our recommendations explicitly advises concurrent review with the public comment period.

-- Our case study examples also indicate that these review times from the Reports Management System sometimes mask or underestimate actual approval time. This occurs when there is some informal presubmission review or because a disapproval is resubmitted and the official submission time does not reflect the length of time from original submission to final approval. These actual review periods extended from over a hundred to several hundred days in one example.

f. How technically accurate is the review OMB conducts? What were your findings?

We found several warning flags regarding the technical quality of OMB reviews:

- Most staff had been trained in fields other than those pertinent to judging the technical merits of an information collection request (e.g., the principles of survey research, survey design, measurement, statistical sampling, and data analysis). Yet new staff received little or no on-the-job training in these areas.
- There was great variability among desk officers in seeking input from people knowledgeable in these technical areas. While 10 percent of monthly contacts were with staff from a technical office within OMB--the Office of Statistical Policy--this ranged from a high of 20 percent to a low of less than 5 percent.
- We selected 17 proposed collections for review by a panel of technical experts and were alarmed to find that 7 of 10 collections that our panel disapproved on technical grounds had been approved by OMB.

g. Was there evidence of selective, predetermined, or politically motivated decisionmaking in OMB's regulatory review in your opinion?

No, we did not find evidence of this kind.

h. What effect has OMB's reviews had on the quality of information?

The OMB reviews are useful in that a formal process has been set up to review a large volume of information requests using criteria that are of some relevance. This review combined with the requirements in recent years to cut back on the amount of information collected from the American public has surely improved the quality of information available. At the same time, we saw that agencies took steps to evade these restrictions such as using focus groups, public forums, and other circumvention strategies that produce information of lower quality than, say, strong sample surveys. OMB has probably made its mark on the agencies that now have 100 percent approval rates; one task to be completed is the improvement of other agencies. Another task is the overall improvement of information resources management as spelled out in the bill.

i. What are the primary recommendations of your report?

That the Director of OMB employ existing authority to delegate primary review responsibility to senior officials within those designated agencies with demonstrated capability:

-- the performance of these agencies can be monitored by spot-checks conducted through OMB;

-- for executive agencies with less effective internal mechanisms for procedural and technical review, we recommended that OMB assist them in improving those mechanisms with the goal of improving the technical quality of the data collections.

That to facilitate sound reviews within OMB, the Director of OMB develop an ongoing training program for its paperwork review staff to ensure that both technical and nontechnical criteria are appropriately and consistently applied to submissions. Additional measures toward this end might include the expansion of technical staff and consultation with external experts.

That to avoid further increase in the time for reviews, OMB review information collection requests concurrently with their public comment period.

2. OMB currently has authority to delegate the approval of information collection requests to agencies which have demonstrated that they have the capacity for meeting the requirements of the Paperwork Reduction Act. In fact, such delegations have been made in only one or two instances.

You have recommended that OMB exercise existing authority to delegate approval to agencies which have established a strong track record for approval of information collection requests.

a. What criteria should OMB use, in your judgment, to make such delegations?

We believe that delegation of review authority to agencies is appropriate where two conditions are met: (1) the agency follows well-developed and systematic procedures for conducting internal review of proposed information collections, which include provisions for adequate technical review where necessary; and (2) OMB review of the agency's submissions over a period of several years has not resulted in the elimination (or substantial modification) of any large or significant information collection.

b. What is your view of the proposed self-certification provision contained in the bill? Is it an effective means of "delegating responsibility"?

This provision authorizes agencies with adequate internal review procedures to independently approve the extension of existing information collections. Our report found an approval rate of 96 percent for previously approved collections, and we found an even higher approval rate for currently approved collections which were being submitted without revision.

In light of the relative rarity of OMB disapproval of requests for extension of an information collection, we believe that agencies can be granted the self-certification authority contained in this bill, provided that OMB retains the authority to review existing information collections where the agency lacks an adequate capability for internal review, or where a collection may have become outdated or unnecessarily burdensome.

c. Are there alternative ways for improving agency capacity for meaningful review of information collection requests and for ensuring that agencies focus on minimizing the burden that necessary information collection places on the public?

We did not study alternative methods; our focus was on the effectiveness of OMB's process. However, we believe it is very important that OMB concentrate on improving the quality of poor agency performers.

d. Are the same review criteria and procedures appropriate for different types of paperwork; e.g., for forms required to obtain benefits, for survey questionnaires, or for procurement paperwork?

We have not developed any recommendations concerning differential treatment of different types of information collections. OMB currently applies additional technical criteria to information collections which make use of statistical sampling. Results of our review suggested that some of OMB's review procedures may inhibit information collections associated with developmental research or in response to discrete, short-term events.

e. Should the justification of individual information collections be viewed in the broader context of an overall information resource management plan? Can this become an integral part of IRM planning processes?

Yes. The individual information collections by an agency should fit into the context of the body of information needed to fulfill a specific mission of the agency (e. g., payment of benefits or compliance) and, therefore, should be a part of the IRM plan and element of the planning process.

C. COMMISSION ON FEDERAL INFORMATION

1. In your testimony, you mention that the reporting date for the Commission on Federal Information may be a problem. The date originally proposed in the bill was tied to the reauthorization period--it was meant to ensure that the Commission's findings would be available for the next reauthorization. Given the Commission's mandate, how long do you think they will need?

We feel that two years should provide the Commission enough time to complete its mandate. The Commission could be required to provide interim reports in order to provide information for the next reauthorization, but a final report within the original timeframe is not feasible.

a. Is GAO prepared to provide support to the Commission?

Yes. We can work with the Commission staff to develop a work plan to carry out their legislative mandate. Additionally, our IRM related reports and ongoing work can be used by the Commission to help define the problems and issues faced by the government in effectively managing information resources.

b. In your testimony, you state that "the Commission's role should be expanded to include examining how well agencies use information internally to manage or to achieve their mission objectives." Would you elaborate?

Our suggestion involves selecting information-intensive activities at certain federal agencies for evaluation. The objective is to determine how the information links to a particular mission and how effectively and efficiently the agency is acquiring, processing, and using the information to support the decisions and actions necessary in accomplishing the mission.

2. A concern I have is the ability of our government to use the information it collects to accurately predict and forecast future trends so as to give policy makers and others the information they need to solve the key questions of the day. Does the Commission adequately address this need?

Yes, under items (4) and (6) in section 203(a), the Commission is to consider deficiencies in providing for needed information and organizational structures needed to ensure ongoing improvements within the federal statistical system. The Commission can help the executive branch determine how to identify key information needs and how to encourage the effective use of that information. The actual execution of an enlightened and efficient information policy rests, of course, upon the executive branch.

3. You mention the Commission proposed in the bill would help address the weaknesses in OMB's forms clearance process. What are those weaknesses in your opinion?

The main weaknesses that we found that the Commission could help address are:

-- Quality problems. We made several recommendations to improve the quality of OMB reviews involving expansion of technical staff, increased training of OMB staff, and the use of consultants and other experts. These steps would improve OMB's capacity to provide technical advice to agencies on how to improve the efficiency and quality of their data collections.

-- Although the great majority of submissions are acted upon within the legal time limits, in recent years the time for these reviews has increased. The number of exceptionally time-consuming reviews has quadrupled. We believe that the Commission could help press for the elimination of redundant reviews and could help refocus OMB's effort to provide more assistance to agencies that need help and less to those that do not.

D. OIRA MANAGEMENT

1. What effect has OIRA's regulatory review process and its commitment to it had on other functions and responsibilities assigned to OIRA, such as information technology, privacy protection, and dissemination policy?

While we have not examined this issue recently, OIRA's heavy involvement in regulatory reviews under the executive orders historically has resulted in less than adequate attention being given to some responsibilities assigned it under the Paperwork Reduction Act and other information-related laws. OMB needs to determine the staff resources required to effectively carry out both the regulatory reviews and Paperwork Reduction Act functions (note that the staff level for OIRA dropped between the early 1980s from about 80 personnel to about 65 as of the date of the Committee hearings).

2. OMB has expressed its opposition to the provision of this bill requiring a line item budget submission for OIRA. Isn't this virtually what happens already when Congress continues to single out OIRA's budget for an individual allocation? What is your view on this issue?

   Yes. It is a provision designed to get OMB to apply adequate personnel resources to fulfilling its responsibilities under the Paperwork Reduction Act.

3. What is your opinion of the provision of S. 1742 that establishes the OIRA Administrator as the primary person with responsibility for OIRA duties? Isn't this a logical extension of what already exists and is similar to the independence Congress created for the Office of Federal Procurement Policy?

   Section 104 of the Senate bill assigns the responsibilities of OMB under the Paperwork Reduction Act directly to the OIRA Administrator and section 103 states that the OMB Director shall be responsible and accountable for all Paperwork Act functions and for coordinating these functions with other functions of OMB. It is suggested that this arrangement would provide independence to OIRA similar to that provided the Office of Federal Procurement Policy (OFPP). While it may provide some measure of independence, the arrangement also tends to cloud who is, in the end, responsible for the Paperwork Reduction Act functions. On the other hand, section 3503(b) of the current law assigns the responsibilities to the OMB Director and requires the Director to delegate the functions to the OIRA Administrator. However, this delegation under current law does not relieve the Director of responsibility for administering the functions. It is clear from the current law that the Director is responsible for the functions. It would help to clarify the relationship between the Administrator and Director in the bill if a change were made in section 103 to have the Director be responsible and accountable for overseeing the functions, etc. Yes, the proposal for OIRA in S. 1742 is similar to the structure established for OFPP in that functions are assigned directly to the OFPP Administrator.

E. OVERSIGHT

1. What can be done by Congress, in your opinion, to ensure that Congress maintains diligent oversight of information management at the program level?

In terms of funding programs, Congress could make it a practice to not fund agencies' major systems development efforts until it receives an independent cost estimate for the system, such as was required by Congress of the Federal Aviation Administration for its Advanced Automation System. In terms of oversight, Congress could hold oversight hearings on agency IRM activities in areas such as (1) how well specific activities are being carried out, (2) how well the IRM personnel are working with program and agency managers to develop the systems for providing the necessary information for accomplishing missions, or (3) the adequacy of the authority of the designated senior IRM official. Congress could also insist on independent testing of systems (e. g., independent system validation and verification) at appropriate stages of the development prior to implementation.

ATTACHMENT

INFORMATION COLLECTION REQUEST APPROVAL RATES, 1985-87, BY AGENCY

1. Agencies with 100 percent approval rates
2. Agencies with 95-99 percent approval rates
3. Agencies with below 95 percent approval rates

AGENCIES FOR WHICH ALL INFORMATION COLLECTION REQUESTS WERE APPROVED IN 1985-87

Code	Agency	Number of submissions
0300	Executive Office of the President	2
0348	Office of Management and Budget	12
0412	United States International Development Cooperation Agency/Agency for International Development	26
0420	Peace Corps	12
	Department of Agriculture:	
0505	Office of Finance and Management	4
0507	Office of Transportation	2
0524	Cooperative State Research Service	5
0525	Office of Grants and Program Systems	1
0527	Extension Service	4
0535	National Agricultural Statistical Service	28
0551	Foreign Agricultural Service	16
0560	Agricultural Stabilization and Conservation Service	64
0572	Rural Electrification Administration	38
0577	Office of International Cooperation and Development	3
0578	Soil Conservation Service	6
0579	Animal and Plant Health Inspection Service	43
0580	Federal Grain Inspection Service	3
0583	Food Safety and Inspection Service	7
0590	Packers and Stockyards Administration	3
	Department of Commerce:	
0651	Patent and Trademark Office	9
0652	Science and Technical Research	3
0660	National Telecommunications and Information Administration	6
0690	Office of the Secretary	4
0693	National Bureau of Standards	2
	Department of Defense:	
0701	Department of the Air Force	53
0702	Department of the Army	42
	Department of Health and Human Services:	
0970	Family Support Administration	33
0991	Office of the Secretary	1

Code	Agency	Number of submissions
	Department of Interior:	
1090	Assistant Secretary for Policy, Budget, and Administration	1
	Department of Justice:	
1103	General Administration	1
1105	Legal Activities	22
1190	Civil Rights Division	1
	Department of Labor:	
1210	Pension and Welfare Benefits Administration	27
1214	Bureau of Labor Management Relations and Cooperative Programs	1
1219	Mine Safety and Health Administration	97
1293	Office of the Assistant Secretary for Veterans' Employment and Training	4
	Department of State:	
1400	Department of State (unspecified)	1
1405	Administration of Foreign Affairs	52
	Department of Treasury:	
1505	Departmental Offices	43
1520	Bureau of Engraving and Printing	2
1525	Bureau of the Mint	1
1535	Bureau of the Public Debt	53
	Department of Education:	
1800	Department of Education (unspecified)	2
1830	Office of Vocational and Adult Education	13
1860	Office of Intergovernmental and Interagency Affairs	2
1870	Office of Civil Rights	1
1885	Office of Bilingual Education and Minority Language Affairs	17
	Department of Energy:	
1901	Departmental and Others	10
1903	Economic Regulatory Administration	7
1910	Office of Administration	38
	Environmental Protection Agency:	
2000	Environmental Protection Agency (unspecified)	6
2090	Office of the Administrator	5

Code	Agency	Number of submissions
	Department of Transportation:	
2105	Office of the Secretary	12
2106	Office of the Secretary-Aviation	21
2135	Saint Lawrence Seaway Development Corporation	3
	Department of Housing and Urban Development:	
2501	Office of the Secretary	2
2503	Government National Mortgage Association	18
2504	Solar Energy and Energy Conservation Bank	2
2506	Office of Community Planning and Development	33
2510	Office of the General Counsel	1
2535	Office of Administration	39
3014	Architectural and Transportation Barriers Compliance Board	3
3024	Civil Aeronautics Board	3
3035	Commission on Civil Rights	3
3038	Commodity Futures Trading Commission	41
3048	Export-Import Bank of the United States	6
3070	Federal Labor Relations Authority	4
3072	Federal Maritime Commission	27
3095	National Archives and Records Administration	1
3133	National Credit Union Administration	52
3135	National Endowment for the Arts	60
3140	National Mediation Board	2
3145	National Science Foundation	31
3147	National Transportation Safety Board	2
3200	Other Independent Agencies (unspecified)	1
3207	Panama Canal Commission	4
3208	Pennsylvania Avenue Development Corporation	1
3220	Railroad Retirement Board	83
3312	Other Temporary Commissions (unspecified)	6
7100	Federal Reserve System	112

AGENCIES FOR WHICH 95-99 PERCENT OF INFORMATION COLLECTION REQUESTS WERE APPROVED IN 1985-87

Code	Agency	Approval Rate(%)	Number of Submissions
3235	Securities and Exchange Commission	99.6	276
3136	National Endowment for the Humanities	98.9	92
0581	Agricultural Marketing Service	98.9	91
0910	Food and Drug Administration	98.5	130
1004	Bureau of Land Management	98.4	63
0625	International Trade Administration	98.4	123
1220	Bureau of Labor Statistics	98.4	61
1545	Internal Revenue Service	98.1	676
1215	Employment Standards Administration	97.9	95
2900	Veterans Administration	97.8	313
1115	Immigration and Naturalization Service	97.7	131
1512	Bureau of Alcohol, Tobacco, and Firearms	97.6	288
0704	Department of Defense - Departmental and Other Submissions	97.5	160
1218	Occupational Safety and Health Administration	97.4	114
2133	Maritime Administration	97.2	36
2700	NASA	97.2	36
0584	Food and Nutrition Service	97.1	105
0596	Forest Service	97.1	35

Code	Agency	Approval Rate	Number of Submissions
1510	Financial Management Service (Treasury Department)	97.1	34
1557	Comptroller of the Currency	97.1	68
3316	Tennessee Valley Authority	97.1	34
3041	Consumer Product Safety Commission	96.9	32
2120	Federal Aviation Administration	96.7	61
0960	Social Security Administration	96.7	274
2137	Research and Special Programs Administration (Transportation Department)	96.7	30
3064	Federal Deposit Insurance Corporation	96.7	60
3206	Office of Personnel Management	96.6	88
9000	Federal Acquisition Regulation (DOD/GSA/NASA)	96.5	85
1212	Pension Benefit Guaranty Corporation (Labor Department)	96.4	28
3068	Federal Home Loan Bank Board	96.4	55
3240	Selective Service System	96.3	27
3060	Federal Communication Commission	96.0	300
3067	Federal Emergency Management Agency	96.0	99
0575	Farmers Home Administration	95.8	71
0607	Bureau of the Census	95.6	206
0937	Office of the Assistant Secretary for Health (HHS)	95.6	68
2502	Office of Housing (HUD)	95.4	154
0925	National Institutes of Health	95.4	87

AGENCIES FOR WHICH FEWER THAN 95 PERCENT OF INFORMATION COLLECTION REQUESTS WERE APPROVED IN 1985-87

Code	Agency	Approval Rate(%)	Number of Submissions
3001	ACTION	94.7	19
3116	United States Information Agency	94.6	37
3245	Small Business Administration	94.6	148
2115	U.S. Coast Guard	94.4	126
0990	HHS Departmental Management	94.2	52
1515	United States Customs Service	94.2	104
3084	Federal Trade Commission	94.1	17
1121	Office of Justice Programs	94.0	50
1117	Drug Enforcement Administration	93.8	16
2080	Environmental Protection Agency (EPA) - Research and Development	93.8	16
1902	Federal Energy Regulatory Commission	93.4	166
0608	Economic and Statistical Analysis - Commerce Department	93.3	30
1850	Office of Educational Research and Improvement	93.3	89
1029	Office of Surface Mining Reclamation and Enforcement	93.2	44
1810	Office of Elementary and Secondary Education	93.1	72
1905	Energy Information Administration	93.0	57
2070	EPA - Pesticides and Toxic Substances	93.0	71

Code	Agency	Approval Rate(%)	Number of Submissions
3137	Institute of Museum Services	92.9	14
0915	Health Services Administration	92.7	82
3046	Equal Employment Opportunity Commission	92.3	13
0938	Health Care Financing Administration	92.2	320
1010	Minerals Management Service (Interior Department)	92.2	64
1076	Bureau of Indian Affairs	92.2	51
3117	International Trade Commission	92.1	38
2050	EPA - Solid Waste and Emergency Response	92.1	63
1205	Employment and Training Administration	91.4	152
2132	Urban Mass Transportation Administration	91.3	23
2577	Office of Public and Indian Housing	91.1	90
0563	Federal Crop Insurance Corporation	90.9	11
0640	Minority Business Development Agency	90.9	11
0930	Alcohol, Drug Abuse, and Mental Health Administration	90.9	33
1032	Bureau of Mines	90.9	22
2030	EPA - Administration and Resource Management	90.9	11
2130	Federal Railroad Administration	90.9	22
3420	Overseas Private Investment Corporation	90.9	11

Code	Agency	Approval Rate(%)	Number of Submissions
0536	Economic Research Service	90.0	20
0610	Economic Development Administration	90.0	20
1028	Geological Survey*	90.0	10
3150	Nuclear Regulatory Commission	89.9	119
2040	EPA - Water	89.8	49
0980	Office of Human Development* Services (HHS)	89.7	58
1024	National Park Service	89.3	28
2127	National Highway Traffic Safety Administration*	89.2	65
0920	Centers for Disease Control*	89.2	83
1820	Office of Special Education and Rehabilitative Services*	89.1	92
0537	Agricultural Cooperative Service*	88.9	9
2138	Research and Special Programs Administration - Aviation (Transportation Department)	88.9	18
2528	Policy Development and Research (HUD)	88.9	27
2529	Office of Fair Housing and Equal Opportunity*	88.9	18
0648	National Oceanic and Atmospheric Administration*	87.1	124
1018	Fish and Wildlife Service	87.0	23
3120	Interstate Commerce Commission	86.4	59
0703	Department of the Navy	86.4	22
1225	Labor Departmental Management*	85.7	21

*The approval rate for this agency was 90 percent or less in 1982-84 and remained 90 percent or less during 1985-87.

Code	Agency	Approval Rate(%)	Number of Submissions
1840	Office of Post-Secondary Education*	85.2	169
2125	Federal Highway Administration	85.2	54
3076	Federal Mediation and Conciliation Service	83.3	12
2060	EPA - Air and Radiation*	82.8	134
0605	Commerce Department General Administration	82.4	17
1093	Office of the Secretary - Interior Department	82.4	17
3090	General Services Administration	82.1	56
2010	EPA - Policy, Planning and Evaluation	80.0	5
1880	Education Departmental Management	79.0	19
1006	Bureau of Reclamation (Interior Department)	75.0	12
1110	Federal Bureau of Investigation	75.0	16
1875	Office of Planning and Budget and Evaluation (Education Department)	69.2	13
0518	Agricultural Research Service*	66.7	6
3037	Committee for Purchase from the Blind and Other Severely Handicapped	55.6	9
0506	Office of Governmental and Public Affairs (Agriculture Department)	50.0	2
0992	Office of Family Assistance - HHS	50.0	2

*The approval rate for this agency was 90 percent or less in 1982-84 and remained 90 percent or less during 1985-87.

Code	Agency	Approval Rate(%)	Number of Submissions
1904	Conservation and Renewable Energy (Energy Department)	50.0	2
2508	Office of the Inspector General - HUD*	50.0	2
0586	Human Nutrition Information Service*	42.9	7
3124	Merit Systems Protection Board	25.0	4

*The approval rate for this agency was 90 percent or less in 1982-84 an remained 90 percent or less during 1985-87.

AGENCIES WHICH HAD PERSISTENT DIFFICULTIES WITH OMB REVIEW *

Code	Agency	Approval Rate in % (#approved/#submitted)	
		1982-84	1985-87
0518	Agricultural Research Service	88.9 (8/9)	66.7 (4/ 6)
0537	Agricultural Cooperative Service	88.2 (15/17)	88.9 (8/ 9)
0586	Human Nutrition Information Service - USDA	38.5 (5/13)	42.9 (3/ 7)
0648	National Oceanic and Atmospheric Administration	88.9 (88/99)	87.1 (108/124)
0920	Centers for Disease Control	85.7 (72/84)	89.2 (74/ 83)
0980	Office of Human Development Services (HHS)	85.5 (65/76)	89.7 (52/ 58)
1028	Geological Survey	81.8 (9/11)	90.0 (9/ 10)
1225	Labor Departmental Management	73.7 (14/19)	85.7 (18/ 21)
1820	Office of Special Education and Rehabilitative Services	86.2 (25/29)	89.1 (82/ 92)
1840	Office of Post-Secondary Education	89.2 (107/120)	85.2 (144/169)
2127	National Highway Traffic Safety Administration	83.3 (60/72)	89.2 (58/ 65)
2060	EPA - Air and Radiation	81.6 (71/87)	82.8 (111/134)
2508	Office of the Inspector General - HUD	50.0 (1/2)	50.0 (1/ 2)
2529	Office of Fair Housing and Equal Opportunity - HUD	69.6 (16/23)	88.9 (16/ 18)

*The approval rate for these agencies was 90 percent or less in 1982-84 and remained 90 percent or less during 1985-87.

OMB WATCH

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Testimony of

Gary D. Bass, Ph.D.
Executive Director
OMB Watch

before the
Senate Committee on Governmental Affairs

concerning

The Federal Information Resources Management Act (S. 1742)

February 21, 1990

Thank you for the opportunity to testify on S. 1742, The Federal Information Resources Management Act. For five years, OMB Watch has monitored OMB's implementation of the Paperwork Reduction Act and our *Monthly Review* has reported on many of OIRA's decisions on a case-by-case basis. We are the only organization that has provided such vigilant and consistent oversight of the paperwork and regulatory process. We know intimately the strengths and weaknesses of the OMB operation.

In the past, we have shown that OMB has misused its paperwork powers to accomplish ideological objectives, interfere with notice-and-comment rulemaking, limit the health and safety reporting required of employers in dangerous occupations such as mining, and more.

Over the last year, we have convened a Working Group on Information Policy, comprised of roughly 40 national organizations, to discuss reauthorization of the Paperwork Reduction Act. Some members of that Working Group testified before your Subcommittee on Government Information and Regulation last summer and have now carefully reviewed and debated the contents of S. 1742.

Despite criticism that OMB Watch has leveled at OMB, we have never advocated repeal of the Paperwork Reduction Act. In fact, quite the reverse, we want to improve and strengthen the law to better manage information resources in the federal government. But in reauthorizing the law, Congress must fix past problems that have become quite apparent and address issues pertinent to the 1990s that have not been addressed in the past.

It is with considered thought about how to improve the Paperwork Reduction Act, input from other public interest organizations, professional associations, and unions on what they consider important, and an understanding of the history and political dynamics surrounding the Act that OMB Watch has reached its conclusions about S. 1742. **OMB Watch strongly supports the thrust of the bill and believes, with modest changes, the bill should move forward as quickly as possible.** It addresses some of the past problems voiced by critics, but respects concerns expressed by OMB—and it should truly be embraced as a bipartisan bill.

My testimony addresses five parts of the bill that have received considerable public attention: Regulatory Review; Paperwork Review; Information Resources Management; Dissemination; and Reauthorization Issues. OMB Watch:

- Enthusiastically supports the bill's attempt to place regulatory review changes in statute. While some clarification and addition is needed in S. 1742's provisions, they are basically quite good and should provide greater public accountability of OMB's activities.
- Believes the paperwork clearance provisions could be strengthened by—replacement of the mandatory 5% paperwork reduction each year with a more targeted plan to reduce paperwork that has the greatest burdens on the public, such as tax forms; balancing the heavy emphasis of assessing burdens with the benefits that are derived from the information collection activity; removing labeling requirements that are not carried out by the federal government from paperwork review since they are really regulatory issues; inclusion of logs of oral communications as part of the OIRA public record; and improvements in OIRA's public docket filing procedures.
- Supports the bill's emphasis on information resources management, which encompasses paperwork reduction, but deals more broadly with the life-cycle of federal information. The Act had this concern when enacted, but a sharpened focus is essential to managing government information in the 1990s.
- Wholeheartedly concurs with the bill's dissemination requirement to affirmatively require agencies to disseminate public information regardless of format. But we believe the proposed provisions could be improved by providing (a) greater specificity, such as in H.R. 3695, and (b) dissemination instructions directly to agencies, not OMB.
- Strongly supports the proposed two-year reauthorization limit.

Regulatory Review

OMB Watch Position

1 Congress should address the entire regulatory process in government. Congress has not appropriately responded to the enormous growth of administrative government and has not provided direction on the proper roles for federal agencies, OMB, Congress, and the

public in the development, implementation, and review of regulations. We understand, however, that the reauthorization of the Paperwork Reduction Act is not the appropriate vehicle for this type of comprehensive review.

2 We strongly support the procedural changes in the OMB regulatory review process that are called for in S. 1742. In particular, we applaud the bill's efforts to: (a) create a deadline by which OIRA must review regulations; (b) require OIRA to maintain detailed records and provide contemporaneous public access to those records; and (c) mandate more detailed justification from OIRA for its actions.

3 Any changes in the regulatory review process should be specified in statute. Administrative agreements do not stand as equal to the weight of law, can easily be changed or simply ignored by OMB when it so chooses, and cannot easily be enforced by the courts. If OMB and Congress can agree to a set of principles through an agreement, then surely the two parties would have no problem adhering to the principles of the legislative process by codifying the agreement.

4 Even though we support S. 1742's regulatory review provisions, we believe it can be further strengthened by:

- **Improving the description of time limits on OIRA reviews.** The bill permits OIRA 30 days to review nonmajor rules, 90 days for major rules, or whatever deadline is mandated by statute or court order. It also permits OIRA to extend its review by 30 days if it is "absolutely necessary." But the bill does not define *nonmajor* and *major*; nor does it clarify what would be considered "absolutely necessary."

  We believe it would be better to establish a standard of 60 days for all regulations without extensions. If you must permit extensions, then such extension should be authorized in writing by the OMB Director with a copy sent to the agency head to be made part of the OMB and agency public record.

- **Adding enforcement criteria.** The bill does not address what will happen if OMB violates the proposed procedures. For example, what happens if OMB exceeds the time limits? Under the paperwork clearance process, when OMB exceeds the time limit, the paperwork is automatically approved. The same standard should apply to OMB's regulatory reviews.

- **Delineating how OMB is to "advise" agencies on the substance of oral communications.** The best way to insure that this provision is adhered to, is to require OMB to log oral communications with agencies and the public. The logs can then be sent to agencies and made part of the agency and OMB public record.

Background on Regulatory Review

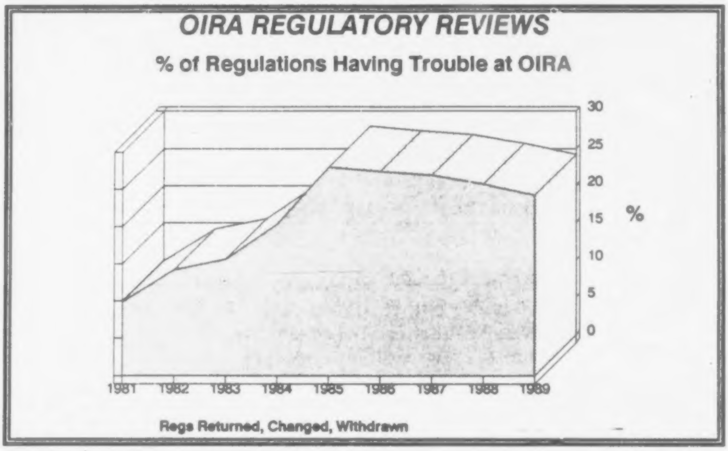
Since 1981 OMB has exerted a cradle to grave influence over agency regulations. The impact has been to: delay regulations affecting the health and safety of Americans; undermine agency regulatory expertise, often for ideological reasons; and adversely affect agency morale, giving agencies a disincentive to regulate. In the end, it is the public that has been the real loser – families subjected to dangerous amounts of lead and asbestos in our public housing, workers exposed to hazardous chemicals without knowledge of their dangers, women endangered by tampons that have no consistent labeling, and much more.

OMB's greatest reach has been through Executive Order 12291, which has been noted by Congress, the media, and public interest organizations. Much of the attention has focused on OMB's use of E.O. 12291 in the early years of the Reagan Administration. Several specific cases grabbed the public's attention and were the grounds for congressional oversight hearings.

By 1986, the House expressed its concern by passing appropriations language that would "defund" OIRA. The Senate, with leadership from Senators Levin and Durenberger, fashioned an "administrative agreement" with OMB to provide for increased public access to the regulatory review procedures.

As the chart below shows, the agreement made little difference in the substantive activities of OIRA reviews. The chart shows that between 1981 and 1984, when OIRA faced intense Congressional scrutiny over its regulatory review actions, no more than 15% of all regulations were changed, returned to agencies, or agencies withdrew them. Since there was so much public concern about OIRA's role and the data indicates less than 15% of regulations were affect, this suggests that OIRA reviews were more targeted to politically sensitive areas.

Chart 1



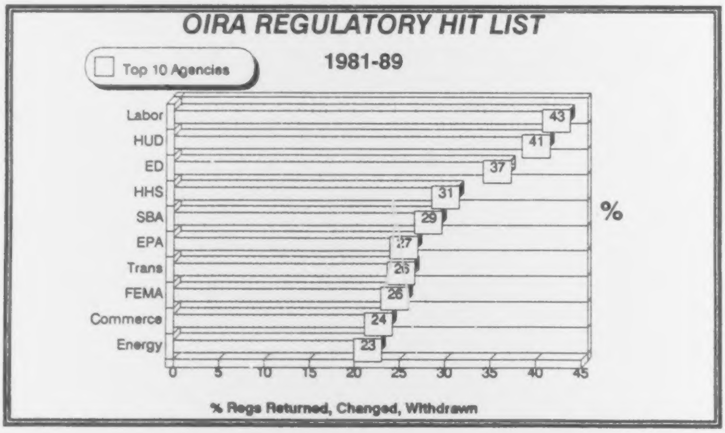
The 1981-84 period was also during the tenure of the President's Task Force on Regulatory Relief, chaired by then-Vice President George Bush. At that time, the White House had a specific campaign targeted on reducing regulatory initiatives – and OMB was in charge of carrying out the Task Force's agenda. Thus, it is surprising that less than 15% of regulations ran into a problem with OIRA.

However, starting in 1985 – the same time that E.O. 12498 was issued – there was a significant increase in the share of regulations running into trouble through the OIRA review process. More than one-quarter of all regulations faced some type of OIRA problem. And the 1986 administrative agreement has had no effect on this statistic – even in 1989, nearly one-quarter of all agency regulations reviewed by OIRA faced some problem. *(Attachment A provides a detailed description of problems with implementation of the 1986 Administrative Agreement.)*

There are two possible explanations for this. First, OIRA is run by ideological political operatives, carrying out the President's actual or perceived wishes by interfering in agency activities. Assuming we can agree that OIRA is not now so ideologically driven, then the data suggest that since 1985 OIRA interference has become an institutionalized part of the agency regulatory process. That is to say, OIRA Desk Officers now consider themselves such a part of the rulemaking process that they insist on any and all changes – big or small, substantive or stylistic. And the tolerance for OIRA Desk Officer interference must also have increased over the years given there has been less public clamor and congressional attention.

Whatever the explanation, it is clear that much greater scrutiny needs to be given to OIRA regulatory review, particularly because of its uneven approach. Over the last decade the same agencies – Labor, HUD, Education, and EPA – have consistently faced disproportionate problems with OIRA reviews (see Chart 2). Between 1981 and 1989, on average,

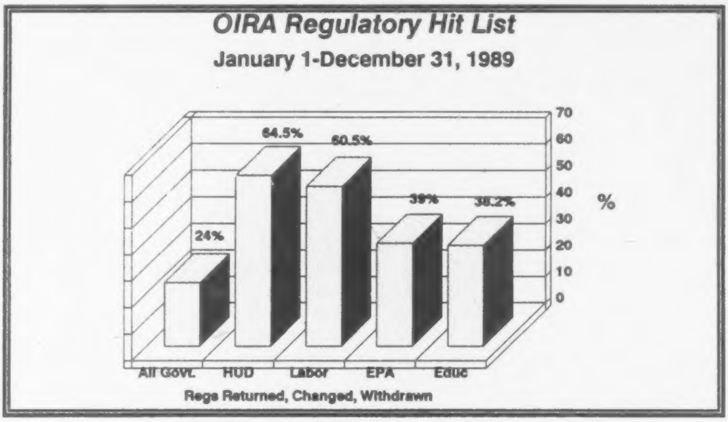
Chart 2



more than 40% of Labor's regulations – mostly from OSHA – were either changed by OIRA, returned, or withdrawn from review. The same is true for HUD regulations.

Lest we think that the Bush OIRA is "kinder and gentler", the data suggests otherwise. Chart 3, below, shows that, while Labor, HUD, Education, and EPA remain targets, OIRA interference has actually *increased* during 1989. Nearly two-thirds of all Labor and HUD regulations ran into an OIRA problem, as did nearly 40% of Education and EPA regulations.

Chart 3



OIRA Regulatory Hit List

January 1-December 31, 1989

These charts demonstrate that we have a serious problem – and it continues to go unaddressed. S.1742 attempts to address some of the problems without confronting the Administration on its authority to conduct regulatory reviews through Executive Orders. While not wholely satisfactory from our perspective, it at least acknowledges there is a problem that needs fixing. By placing procedural constraints on OIRA, it gives the public interest community, Congress, and the media opportunities to scrutinize OIRA's activities – in much the same way that other agencies are scrutinized.

Prompted by the House's initiative to address some of these problems through an "Administrative Agreement," there has been much discussion about dropping the regulatory review provisions of S. 1742 and pursuing an Administrative Agreement. This would be a major mistake. If OMB and Congress can agree to procedural changes through an Administrative Agreement, then why not put the provisions in law. What is OMB so fearful of? Certainly not constitutional questions, since OMB's authority is not being challenged.

OMB has repeatedly demonstrated that it will do as it chooses when it chooses. For example, last summer OMB was to publish its fifth edition of the *Regulatory Program*. Even though it was apparently typeset and prepared for release, OMB did not publish it. What recourse does the public have? None. It was required by Executive Order, not law, and gives the public no right to sue.

Ours is a government of laws, debated and written by Congress. It is not a government of agreements between individuals in the Executive and Legislative branches, which undermines legislative debate and circumvents enforcement by the Judiciary. An Administrative Agreement will set a bad precedent, especially when an Agreement is likely to be so strikingly similar to the provisions of S. 1742.

Paperwork Clearance

OMB Watch Position

1 S. 1742 makes important improvements in the paperwork clearance process at OIRA. Acknowledging the importance of paperwork reduction, it requires OIRA to focus attention on areas of greatest need. This is an significant step in rectifying past problems.

2 We strongly support the proposed new public notice requirements. Under S. 1742, agencies are required to provide a summary in the *Federal Register* of the paperwork proposal if it is a new one, or changes that are being proposed if an existing information collection activity. The bill also requires agencies to announce a 30-day public comment period on all submissions to OIRA. OIRA must wait 30 days before making a decision and must consider the public comments. This gives the public meaningful opportunity to participate, and simultaneously addresses criticism that OIRA serves as a conduit for business interests by making OIRA accountable to the public comments it receives.

3 We strongly support provisions in S. 1742 to improve the review process of paperwork contained in regulations. The bill retains Senator Kennedy's amendment to the 1980 Act that develops a separate track for OIRA's review of regulatory paperwork. Congress did not want OIRA's paperwork review authority to be used to interfere with the substance of agency regulations. But because paperwork is often used to carry out regulations (e.g., recordkeeping requirements), and because OIRA can disapprove paperwork thereby thwarting the agency's ability to carry out the regulation, OIRA has been able to force agencies to enter rulemaking by its review of paperwork. (Once an agency enters rulemaking, the proposal must be reviewed by OIRA under E.O.s 12498 and 12291.)

The retention of the Kennedy Amendment in S. 1742 is a signal to OMB that Congress still intends to protect the regulatory process from intrusive paperwork review. This intention will require language inserted in the legislative history of the bill.

The bill also provides a much needed addition to the Kennedy Amendment. It proposes a new process for regulatory paperwork that comes up for renewal. Until now there has been no process delineated in law. The bill's provisions help to insure that current agency regulatory paperwork will be reviewed, but will not be held hostage by OIRA to force them into rulemaking. From our perspective, this is an essential provision in the bill.

4 We support the bill's improved recordkeeping and reporting requirements. OIRA must provide detailed justifications for its actions and make these justifications part of the public record. This will greatly help hold OIRA accountable to Congress and the public interest.

5 There are many other improvements proposed by S. 1742 that we support. For example, the bill requires OIRA to establish a training program for OIRA Desk Officers. OMB Watch has repeatedly reported how decisions by OIRA Desk Officers are inconsistent. One desk officer will disapprove a proposed study because it has too small a sample size; another will approve the same sample size. One desk officer will disapprove a survey because it does not generalize to the population at large; another desk officer will disapprove a survey because it does generalize to the population at large. Training will hopefully make decisions and guidance to agencies more consistent.

6 We believe the paperwork clearance portion of the bill can be improved in the following ways:

- **Replace the annual mandatory 5% paperwork reduction with a more targeted plan to reduce paperwork that has the greatest burdens on the public.** The bill continues the mandate to reduce information collection burden by 5% per year. While nearly everyone agrees that there is a need to constrain paperwork burdens, it is absurd to mandate government-wide automatic reductions each year without regard for the collection activity. Instead Congress and the public would be better served by targeted reductions.

  For example, S. 1742 could mandate OIRA to annually propose to Congress areas of paperwork reduction. The annual proposal would permit OIRA to better describe its intentions for the forthcoming year, reduce critic's main claim of disproportionate attention to areas with less paperwork burden, and give Congress a better record on which to conduct oversight. The OIRA annual proposal could describe the paperwork inventory that is to be reviewed in the forthcoming year and provide information on OIRA plans to reduce burden without loss of benefit.

- **The bill should require OIRA to assess benefits of paperwork, not just burdens.** This is absolutely essential and encompasses three principles. First, the past emphasis on information collection "burden hours" does not give an adequate picture of the usefulness of the activity or benefit of the information collection to society. Burden, without consideration of benefit, should not be adequate justification for OIRA approvals or disapprovals. Second, the consideration of benefits is especially important when such benefits do not come to those who must comply with the information collection activity. For example, when a company fills out a form, OIRA only considers the burden imposed on the company, not the benefits derived by workers. Obviously, consideration of only the company's viewpoint will skew OIRA's determinations.

Finally, no one wants to needlessly burden small business with hoards of paperwork. But we do, for example, want to protect worker health and safety – regardless of the size of the company. A worker is no less endangered from chemical exposure because the employer is a small business as opposed to a multinational corporation. Special consideration should always be given to minimizing paperwork burden for small business – but, again, not at the expense of the health and safety of the public.

- **Remove labeling and other third part notification requirements from paperwork review.** These types of requirements are already reviewed by OIRA under Executive Orders 12291 and 12498. Labels and other third party notification requirements are not information collection activities; they are regulatory considerations and should be treated as such. The line must be drawn here to avoid continued use of the paperwork review process to intrude on the substantive decision-making authority of agencies.

- **Include logs of oral communications as part of the OIRA public record.** Much of the negotiation between staff at the agency and at OIRA takes place over the telephone. The contents of these conversations are not recorded anywhere. As a result, the public record lacks important and significant documentation.

- **Direct OIRA to improve its public docket room** and filing procedures for public documents. The OIRA public docket room is disorganized and important documents are often missing from files. It can take weeks for a docket librarian to track down information from a file. Sometimes, the information cannot be found at all. Another problem is that front-line OIRA personnel often do not know or cannot correctly answer questions about what is actually available there for inspection. Finally, the OIRA computer services for tracking information collection activities needs improvements and should provide access to the public.

- **Create a process for agencies and the public to appeal OIRA decisions.** Only independent regulatory agencies, such as the FTC, through a majority vote of their members, can override OIRA paperwork decisions. So once OIRA makes a paperwork decision, most agencies have little choice but to live with it. They can always reargue the same points or resubmit the proposal with changes OIRA has suggested, but sometimes even that gets nowhere. And when it does, the changes can totally alter what information is actually collected.

  Members of the public also have no opportunity to appeal OIRA decisions they do not support, short of trying to involve Congress. Paperwork reduction is intended to be populist, reducing the collection of information when intrusive on society. Yet there is no opportunity for the public to appeal OIRA decisions. (S. 1742's public comment provisions should help the public somewhat.)

Background on Paperwork Clearance

Whenever a federal agency wants to ask a question of 10 or more people, it first needs permission from OIRA to do so. After a proposal has passed successfully through an agency's internal clearance process, then the OIRA review process starts. In all it usually takes at least six months, half of which can be at OIRA, for an agency to get clearance of paperwork – more if it is controversial.

OIRA takes a broad view of what qualifies as paperwork. According to OIRA, paperwork is more than surveys, questionnaires, applications, tax forms, and reporting and recordkeeping required by regulations. It also includes:

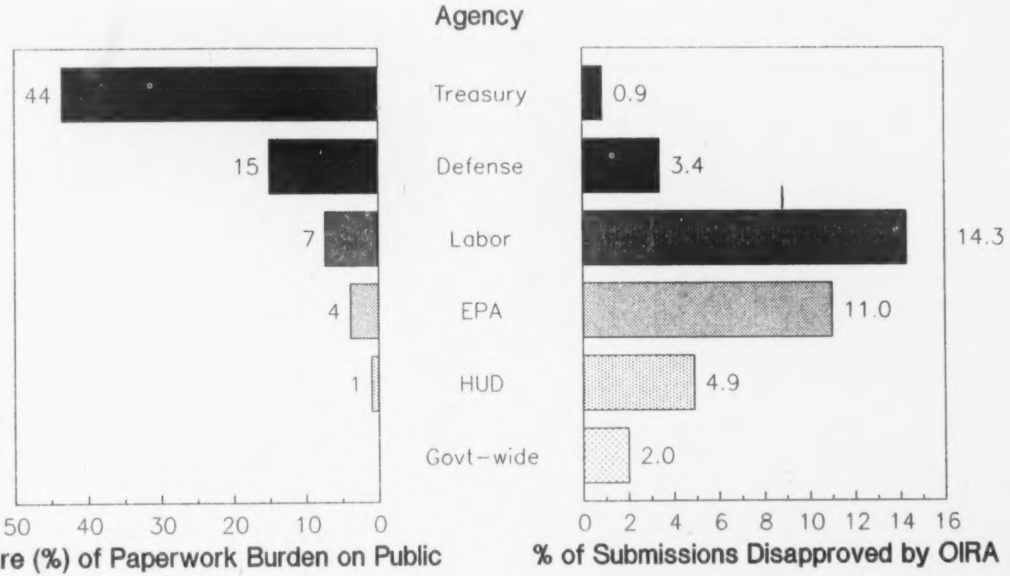
- *Disclosure and labeling requirements*, such as those found on food or drugs. OIRA considers an agency the sponsor of the "paperwork" requiring people or companies to disclose information to others, whether in the form of publication in the newspaper, posting on a premises, printing on a label or other matter distributed with a product, or orally through, for example, training programs.
- *Tests, inspections, and measurements*, such as those of air quality in underground coal mines.
- *Medical monitoring and surveillance*, such as OSHA regulations that require periodic medical examinations for workers.
- *Phone calls* to ten or more people to obtain information.
- *Site visit*, such as to gather samples to set exposure limits for health and safety standards.

OIRA has used its paperwork powers in a disproportionate manner by targeting certain agencies for drastic paperwork reductions, while leaving other agencies practically to their own devices when it comes to imposing paperwork burden on the public. As Chart 4, on the next page, shows, the agencies with the least paperwork burden on the public – HUD, EPA, and Labor (particularly OSHA and MSHA) – have the hardest time getting paperwork through OIRA. Yet those agencies imposing the greatest burden on the public – Treasury (which includes the IRS) and Defense (which includes procurement-related paperwork) – have little problem getting through the OIRA review process.

Thus, OSHA/MSHA account for less than 7% of all paperwork imposed on the public, but have had 14% of their proposals rejected by OIRA. Treasury, on the other hand, accounts for nearly half of all government paperwork, but OIRA has disapproved less than 1% of its forms.

Another way to look at these numbers: OSHA/MSHA proposals are 14 times more likely to face disapproval than forms from Treasury, and 4 times more likely than forms from Defense.

Share of Agency Paperwork Burden Compared to OIRA Disapproval Rates



Agencies shown add to 71% of total burden.

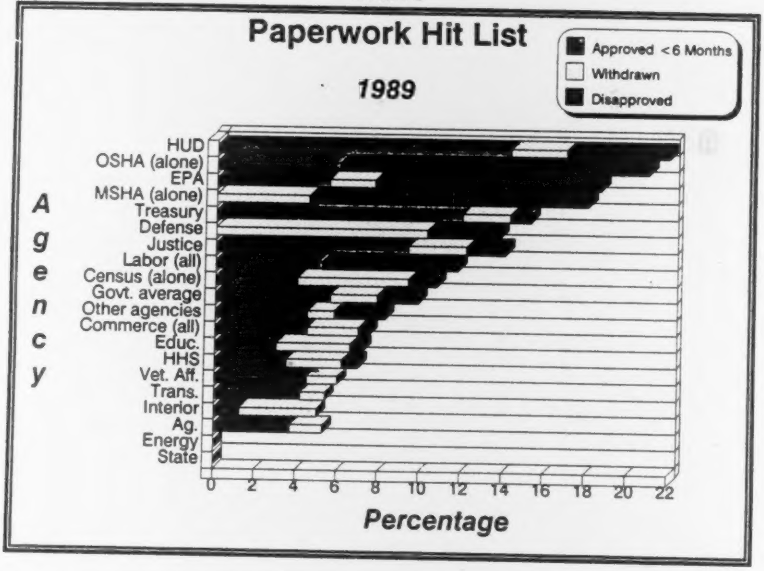
Sources: Information Collection Budget, FY 1989;
OIRA monthly "Action Lists", Jan.-Dec., 1989

Disapproval rate for Labor just includes OSHA/MSHA

We have found, however, that looking at disapprovals alone is not an adequate statistic when speaking about paperwork decisions. For example, it is not unusual for an agency to withdraw a proposal from OIRA review at OIRA's request. It is also quite common for OIRA to give short-term approvals, for less than one year, to proposals with which they have a problem – forcing agencies to resubmit justification or make modifications. Finally, it is not unusual for OIRA to give an approval contingent on any number of changes. The agency must make these modifications to receive an OIRA approval. Despite major OIRA interference, it is logged as an approval, without any indication of OIRA interference.

Taking disapprovals, withdrawals, and approvals for less than 6-months, we have developed a picture of which agencies have had the most problem getting through the OIRA paperwork clearance process. Chart 5, below, shows that HUD, OSHA, EPA, and MSHA led the way in 1989. Roughly one in five of their submissions were either disapproved, withdrawn, or approved for less than 6 months. The data about short-term approvals suggests the need for further research and oversight by Congress.

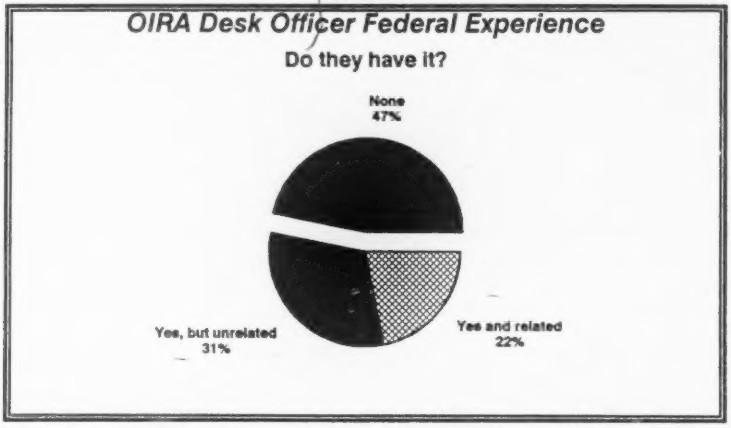
Chart 5



It is also interesting to see how OIRA has used its resources. For example, although EPA accounts for roughly 4% of all federal paperwork burden (110 proposals in 1988 and 91 in 1989), OIRA has assigned four of its less than three dozen Desk Officers to review EPA paperwork. By comparison, Treasury accounts for 43% of government paperwork burden and submitted 325 proposals in 1988 and 429 in 1989. Yet only one Desk Officer was assigned to review paperwork (except for paperwork from the Comptroller of the Currency's office, which submitted 10 proposals).

As just mentioned, less than three dozen Desk Officers are reviewing all information collection activities in government – not to mention all regulations under E.O.s 12498 and 12291. A review of the biographies of OIRA Desk Officers makes evident their general lack of experience with agency concerns, especially with the agencies for which they are directly responsible. Chart 6, below, shows that in 1988, nearly half (47%) of OIRA Desk Officers had no previous federal agency experience at all, and an additional 31% had agency experience unrelated to their area of responsibility. Only 22% – less than one-quarter of Desk Officers – listed previous employment with agencies under their purview.

Chart 6



There are numerous examples of how little Desk Officers may actually know about the subject involved in a particular proposal they are supposed to evaluate. Futhermore, few Desk Officers have any scientific background at all. Yet they seem to have no compunction about passing scientific judgment on studies, designed and reviewed by agency and outside scientific experts. For some examples, see OMB Watch's *Playing the Numbers: OMB and Paperwork Reduction – An Analysis of 1988 OMB Paperwork Decisions*.

Even without describing case examples, the above information cries out for the need to reform the paperwork clearance process. S. 1742 would go a long way to fix some of these problems. Unfortunately, S. 1742 doesn't go far enough in challenging the criteria OIRA uses in reviewing paperwork. But requirements mandating the review of benefits, not just burden, would significantly help.

Information Resources Management

OMB Watch Position

1 We support S. 1742's proposal to change the name of the Act from the Paperwork Reduction Act to the Federal Information Resources Management Act. This provides a better description of the purposes and goals of the law.

2 S. 1742 more clearly defines the intention of the 1980 Act by improving the description of information resources management and delineating OIRA's responsibilities. It acknowledges the importance of paperwork reduction, but goes well beyond this narrow purpose – and responds to a host of needs that we face in the 1990s. The IRM emphasis in S. 1742 is critical as it defines a coordinated federal policy approach to managing an essential national resource – our public information.

3 We support S. 1742's provision for a chief IRM official in each agency. It appears that the bill's authors have given careful thought to this provision, especially by requiring the individual be a career civil servant. This will help provide "institutional memory" and depoliticize information activities. Our experience is that it is very difficult to encourage the type of communication within agencies that is envisioned by S. 1742 – where program staff work hand-in-hand with IRM experts. Nevertheless, it is needed and should be encouraged.

4 We support provisions in S. 1742 to improve statistical policy and coordination. These include revision of OIRA's statistical responsibilities and inclusion as part of the U.S. budget an analysis of resources allocated for statistical programs. We also support the creation of an Advisory Committee on Statistical Policy as provided in S. 1742, but believe more detail needs to be provided on tasks of the Committee.

5 We support creation of an Advisory Committee on Information Policy, but believe its tasks should be defined more clearly.

6 We support provisions in S. 1742 regarding the Federal Information Locator System (FILS). The idea of establishing a computerized comprehensive inventory of information collection requests is very important in achieving paperwork reduction. Assuming the system will be publicly accessible, it can be used by agencies and the public to determine whether there is duplication in paperwork. It can also better serve the public and Congress in assessing the scope and detail of paperwork that government is requiring.

Background on Information Management Resources

OIRA's implementation of the Paperwork Reduction Act has generally pleased those who believe the federal government's appetite for information should be curbed. However, it has not pleased those who note the ways in which OIRA has used paperwork clearance to target particular programs for exceedingly critical review, such as occupational and environmental health research. Or to target information collection in areas of disfavor with the President's priorities. This has had perhaps its most lasting impact on the federal government's ability to provide needed statistical information to policymakers in government, as well as in the private sector.

OMB was charged in 1980 with developing comprehensive information policies for the entire federal government. The Act specified a number of tasks that went beyond paperwork clearance. Over the years, OMB has been criticized by the General Accounting Office, Congress, and public interest groups for ignoring these information resources management tasks.

Information resources management involves the coordinated planning and management of all information activities, from creation, collection, and use, through dissemination and archiving. IRM figured prominently in the deliberations of the Paperwork Commission of 1970s, which seized on the concept to call for the coordinated management of all federal information activities. Criticizing the way in which the management of information activities was fragmented within and among agencies, the Commission called for a "single management coordination umbrella." The Paperwork Reduction Act was intended to be that IRM "umbrella."

Unfortunately, OMB's fixation with paperwork control interfered with its functions to improve the management of federal information activities. OMB disregarded its responsibilities for statistical policy and coordination and records management. It has trivialized its supervision of the Privacy Act, passing off the development of policies and guidelines for simple reiteration of statutory mandates, leaving agencies without direction. It has given scant attention to its ADP and telecommunications responsibilities. In short, OMB has virtually ignored its statutory responsibility to improve federal information resources management.

S. 1742 makes an important statement. It acknowledges that the 1990s are the information age and that the federal government must make a concerted effort to manage its information resources. The bill does not repudiate paperwork reduction goals. Rather, it subsumes paperwork reduction as a critical part of the management of information resources – a logical thing to do.

There must be a fundamental shift in perspective on the value of federal information activities and the responsibility of the federal government to carry them out. First and foremost, government information should be recognized as an essential public service function, undertaken at public expense to fulfill public needs. Its status as a commodity or resource should be secondary to its nature as a public service.

S. 1742 helps us to begin moving in this direction. Criticism should only be leveled at the bill for not going far enough. While the bill strengthens the IRM capabilities of federal agencies, it falls short of fulfilling obvious needs to increase the budgets of OIRA and agency IRM officials.

Dissemination

OMB Watch Position

1 We wholeheartedly support principles that call for the affirmative responsibilities of agencies to disseminate information regardless of format—print and electronic. S. 1742 provides such principles.

2 We believe S. 1742 should provide greater specificity on what it expects from OMB in carrying out its dissemination responsibilities. For example, one principle—shared public and private responsibility is "sound public policy"—needs greater clarification, given OMB's past resolve to privatize government information activities.

3 The bill does not address specific agency responsibilities, such as the need for procedures on fee waivers, user fees that don't exceed the marginal cost of dissemination, and more. This needs to be done.

4 The bill would be better off addressing dissemination instructions to agencies, not OMB. Given the past problems of OMB interference in agency dissemination activities and OMB's recent view that it should not be involved in the operational decisions of agencies, it would be wise to redraft this section.

5 We strongly support a requirement that encourages agencies to review available public and private information products and services to identify initiatives that are equivalent to the agency's *and* "reasonably achieves the dissemination objectives of the agency." Our support for this provision is based on our understanding that this is a repudiation of OMB's current privatization policy (see below). Our reading of the provision is that an agency would not be required to use the private sector's services if did not meet the agency's objectives. But the provision would require agencies to first review services that exist prior to undertaking such efforts, thereby reducing the need for them to reinvent the wheel.

6 We believe Congress will need to revisit these issues in the near future. For example, vigilant congressional oversight will be needed on OMB's regulations to carry out these provisions. Congress will also need to insure that public information handled by the private sector has provisions for reasonable public access, such as through the Depository Library Program, and that long-term considerations to the maintenance and provision of information services are given prior to consideration of private sector involvement. Congress will need to review OIRA's assessment on the feasibility of creating an inventory of all information dissemination products and services and determine who be responsible for carrying out this inventory. Finally, Congress, not through S. 1742, will need to review the printing laws to bring them up to date with the 1990s and the use of electronic information technology.

Background on Dissemination

When passed in 1980, the Paperwork Reduction Act contained two mentions of the word "dissemination." In the Act's 1986 reauthorization, "dissemination" was added in four more places.

It was not until the end of 1985 that OMB issued its long awaited Circular A-130, "The Management of Federal Information Resources." The Circular was applauded by information services companies for its requirement that agencies "look first to private sources" when planning information activities. However, librarians and the public interest community roundly criticized the Circular as a patchwork quilt of already existing policies and requirements, stitched together with a bias against government information activities and towards privatizing government operations.

The Circular provides specific restrictive instructions on dissemination. It states that agencies shall:

> "Disseminate such information products and services as are:
> (a) Specifically required by law; or
> (b) Necessary for the proper performance of agency functions, provided that the latter *do not duplicate similar products or services that are or would otherwise be provided by other government or private sector organizations.*" [emphasis added]

In January, 1989, OMB proposed to extend this rigid privatization principle to dissemination of electronic information. After a firestorm of protest, in June, 1989, OMB withdrew the January proposal and announced the intention to reverse its basic positions under Circular A-130. The June announcement was very consistent with the direction of S.1742, stating that agencies have an affirmative responsibility to disseminate information. It also repudiated any intention of exercising operational control of agency information dissemination activities.

Until Congress legislates dissemination policy, however, such as provided by S. 1742, Circular A-130 is in effect. Even OMB's comments from last June about reversing its intentions are not in effect, since the office has not issued regulations altering the Circular.

Those who have followed OMB's dissemination policies are very skeptical about granting OMB any discretion over setting policy. Most, however, believe that it is essential to set federal dissemination policies – particularly as we move into the electronic information age.

Reauthorization Issues

OMB Watch Position

1 We strongly support S. 1742's two-year reauthorization of the bill. We have taken this position for several reasons:

- Congressional oversight is greatly needed. But because of many reasons, it seems to only occur during the reauthorization process. The two-year reauthorization cycle will force Congress to give appropriate oversight.

- There are many new provisions that are likely to be added, such as new agency and OIRA procedures and new dissemination responsibilities. It would be unwise to let the reauthorization process go beyond two years without revisiting these changes to see if improvements or modifications are needed.

- A more frequent and routine reauthorization process will likely lead to less confrontation and contention on the issues.

- The Administration has called for a three-year reauthorization. Reauthorization was to occur last October, but still has not. Even with two-year reauthorization, as called for in S. 1742, OIRA will have operated for three years without review since the bill will not pass until later this year.

2 We support the increase in money authorized for activities described in S. 1742. In fact, Congress may want to consider further increases in the authorization of appropriations to insure that the IRM mandates are carried out.

3 Requiring the President's budget submission to include OIRA as a line item activity will greatly aid accountability. Coupled with enforcement of the 1986 changes to make OIRA a line item appropriation item, this will give Congress a better opportunity to inspect how OIRA is implementing the Act. This is especially important given the history of OIRA ignoring IRM mandates in the past.

Conclusion

We appreciate the opportunity to testify today. One point should be clear: **S. 1742 is a good bill. It can be modified slightly as this testimony suggests and should be moved through the Senate as quickly as possible.** Authorization of funds to carry out the Act expired last October 1 and no extension has passed. This cannot be allowed to continue. OIRA has enormous governmental responsibilities and deserves the full attention of the Congress in passing a reauthorization bill.

The Subcommittee on Government Information and Regulation deserves special mention for its fine work in drafting S. 1742. The Subcommittee heard many points of view about reauthorization at its hearings last summer; it met with a number of groups – all having differing views on the issue; and it did a careful review of the legislative history and implementation of the Act. While OMB Watch did not "get" all the things we wanted in S. 1742, we respect the process and believe we had a fair opportunity to present our point of view.

Today we have been given another chance to voice our views. We appreciate the opportunity. But again, reauthorization must move forward now and with urgent speed.

Attachment A

THE 1986 ADMINISTRATIVE AGREEMENT

In 1986, then-OIRA Administrator Wendy Gramm, at congressional urging, implemented changes in the OIRA regulatory review process to encourage greater public scrutiny of her office's actions. The main changes in the process and the problems associated with those changes follow.1

E.O. 12498

1986 CHANGE

1. All agency draft submissions are to be available in the public reading room once the annual *Regulatory Program* is published.

CONCERNS

1. OMB did not publish the *Regulatory Program* in 1989. Accordingly, the public cannot review any files.

2. OMB Watch tried to review such draft submissions in 1986, 1987, and 1988. In no year did OIRA have the submissions filed; they were in boxes and so disorganized that it was next to impossible to assess what occurred during the reviews.

3. The draft submissions were not dated. In fact, the files mostly contained copies of galleys that were to be sent to the printer. We could not determine if earlier draft submissions existed.

4. It was impossible to determine which items had been disapproved or modified. There were no indications of OIRA comments or instructions. There were no memos or letters from OIRA or agencies about the matters under review.

5. The files are now organized by subject, not by agency submission. This makes it very difficult to find a specific agency proposal. Furthermore, there is no clear tracking system to follow the life of a regulation and its associated paperwork.

E.O. 12291

1986 CHANGES

1. Once an Advance Notice of Proposed Rulemaking (ANPRM), NPRM, or final rule has been published in the *Federal Register*, OIRA will make available, upon written request, the agency draft submission to OIRA.

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1 "Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498," from OIRA Administrator Wendy Gramm, June 13, 1986, pp. 1-5.

2. OIRA will also make available, upon written request after *Federal Register* publication, all written correspondence with agency heads about a regulatory review.

CONCERNS

1. OMB Watch has requested draft submissions from OIRA and compared them to copies obtained from agencies. It is not unusual for the copies to be different. This leads us to conclude that not all agency draft submissions are being made publicly available.

2. If the draft submission differs from the *Federal Register* notice, there is no way to tell why that occurred. Is the difference due to substantive OIRA interference? Or did the agency initiate the change?

3. Written reasons for proposed OIRA changes are not part of the public record, even though OIRA claims to give such written reasons to the agencies.

4. Obtaining written correspondence between OIRA and the agency regarding a rulemaking is important and useful. Unfortunately, most communications are not with the agency head, but with lower level staff, and, therefore, not covered by the revised procedures. Also, a significant number of communications are oral so they are not covered by the revised procedures.

1986 CHANGES

The following procedures established for EPA, are extended to other agencies, if they elect. To date, according to OIRA, only four other agencies have so elected – the Departments of Labor, Transportation, Housing and Urban Development, and the Treasury.

1. OIRA will send the agency copies of all written materials it receives concerning a regulatory review.

2. OIRA will advise the agency of all oral communications, including meetings and telephone calls, with anyone outside of government concerning a regulatory review. OIRA will also invite the agency to all scheduled meetings with people outside of government concerning a regulatory review.

CONCERNS

1. There is no list of electing agencies in the reading room.

2. The procedures should extend to all agencies. Materials provided by OIRA should be placed in the agency rulemaking record.

3. OIRA should be required to do more than "advise" agencies of oral communications. OIRA should be required to summarize the main points of the meeting or telephone conversation.

1986 CHANGES

1. OIRA will place in its public reading room, within three to five days of receipt: all

written material received from people outside of government concerning a rule and lists of all meetings and oral communications with people outside of government concerning a rule.

2. OIRA will make available by the 10th of each month in the public reading room (and by written request) a list of all regulatory proposals reviewed by OIRA, along with the length of review for each.

CONCERNS

1. OMB Watch asked about the list of meetings and oral communications for electing agencies. Several OIRA staff knew nothing about the procedure or the lists until OMB Watch showed them testimony mentioning it given by past OIRA Administrator S. Jay Plager in June, 1989. Shortly after, we received a list of telephone contacts with the public. The list begins on November 25, 1986, and ends on July 23, 1987. So, according to OIRA records, OIRA officials have had no phone contacts with members of the public about regulations under review for any of the electing agencies for more than two years.

2. The list of meetings and oral communications should be kept for all agencies. Oral communications should contain a summary of the conversation.

3. The list of all regulatory proposals is not regularly made available in the reading room by the 10th of each month. What is available is a summary for each agency of the OIRA actions taken and the length of time they took. While the list is helpful, it does not contain an identifier number. Without the number, it is very difficult, if not impossible, to track the regulation to its publication in the *Federal Register*. This is because the name on the OIRA list is not always the same as the name that appears in the *Federal Register*.

Not only has implementation of the 1986 Administrative Agreement been only modestly successful, the Agreement does not even address two key issues:

- Delays remain a problem – even under the Bush Administration; and
- OIRA accountability. At a minimum, the public should be able to find out when an agency sends a regulatory proposal to OIRA for review. Under the paperwork review process, OIRA makes available a computer printout with information for each department and agency, the name of the paperwork, an identifier number, date received in OIRA, the type of paperwork it is, the name of the reviewer, the agency form number, the action date (if OIRA action has occurred), the expiration date of the paperwork (if approved), and the action taken by OIRA. The same type of printout should be available for regulatory reviews.

  Furthermore, the public should be given access to the OIRA rulemaking record just as it is given access to agency records. This should include logs of communications – oral and written – with anyone inside or outside of government concerning a specific rulemaking under review.

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TESTIMONY OF

SHERRY ETTLESON, STAFF ATTORNEY
PUBLIC CITIZEN'S CONGRESS WATCH

ON

S. 1742, THE FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

BEFORE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

FEBRUARY 21, 1990

Mr. Chairman, members of the committee, my name is Sherry Ettleson. I am a staff attorney for Public Citizen's Congress Watch. Public Citizen is a nonprofit membership organization representing 65,000 members nationwide. Public Citizen represents consumer interests through lobbying, litigation, research and publications. Since its founding by Ralph Nader in 1971, Public Citizen has fought for consumer rights in the marketplace, for safe products, for a healthy environment and workplace, for clean and safe energy sources and for corporate and government accountability. I am accompanied by David C. Vladeck, a senior attorney at Public Citizen Litigation Group who has substantial expertise in the area of OMB involvement in rulemaking.

Mr. Chairman, I commend you for holding these hearings to address the Office of Management and Budget's (OMB) enormous control over the regulatory process and taking the necessary time to examine the damage such control has caused to the health and safety of this Nation. I also applaud Senator Bingaman and his staff for all their hard work to introduce legislation to solve some of the problems of concern.

Public Citizen has long fought against OMB interference and control over regulatory decisions -- particularly OMB's focus on stopping health and safety standards opposed by business.

The Problem: OMB's Usurpation of Control in the Regulatory Process

Over the last decade, OMB has used the combination of the Paperwork Reduction Act, and two executive orders issued by former President Reagan, to inject political ideology into the regulatory process. OMB's authority displaces the discretionary authority of federal agencies thus violating congressional delegations of rulemaking powers. Instead of coordinating the activities of the agencies to prevent duplication and needlessly burdensome paperwork, OMB uses its authority to substitute its judgment for that of the expert agencies. Executive Branch authority to coordinate policy does not extend to overriding Congressional statutory mandates. It is the duty of the agency heads, and not OMB, to balance the substantive and political merits of any initiative. OMB should be concentrating its efforts on managing federal information resources -- the original purpose of the Paperwork Reduction Act.

Under this combination of authority, OMB exercises cradle-to-grave control over the administrative process. OMB has used its power repeatedly to cut back on health, job safety, environmental, consumer, and civil rights regulations, by weakening regulations, delaying their issuance, and, in some cases, forbidding an agency to take action.

The following are some graphic examples of OMB's interference over the last ten years in the name of cutting taxpayers cost and protecting our free market system:

* OMB's delay for several years of the FDA's issuance of a regulation that required manufacturers of aspirin to warn that giving aspirin to a child with the chicken pox or flu greatly increases the risk of developing Reye's Syndrome -- a serious and often fatal disease;

* OMB's six year delay of FDA's issuance of regulations to require uniform absorbency labeling for tampons to reduce the incidence of toxic shock syndrome, a serious and often fatal disease that afflicts women. In a lawsuit filed by Public Citizen Health Research Group, a federal district court judge found that "this delay in issuing a tampon absorbency regulation is wholly unreasonable and unacceptable," and ordered the FDA to require uniform labelling by October 30, 1989.

* OMB's delay for fifteen months and then substantially diluting FDA regulations to require testing of all infant formula to make sure that it contains the correct levels of nutrients crucial to an infant's physical development;

* OMB's pressure on FDA to permit the continued use of carcinogenic color additives in foods, drugs, and cosmetics despite the Delaney clause of the Federal Food, Drug, and Cosmetic Act which prohibits the use of any dye found to cause cancer in animals or humans;

* OMB's more than two year delay and then weakening of the Occupational Safety and Health Administration's hazards communication rule requiring manufacturers to inform employees of the extremely toxic chemicals used in the workplace.

* OMB's delay, and finally elimination, of a key provision of an OSHA regulation to protect hospital workers from exposure to ethylene oxide -- a widely used sterilant linked to cancer, chromosome damage, and miscarriages;

* OMB's more than five year delay of EPA's issuance of a

regulation requiring the phase-out of products containing asbestos -- a known human carcinogen.

If OMB's authority to interfere in the regulatory process is not restricted, we fear that the agency will continue to exercise control over the implementation of vital health and safety laws. For example, Congress is currently struggling to pass the Clean Air Act. A lot of time, energy, and expertise is being expended to negotiate and pass this legislation. When it becomes law, it will be left to the expert federal agencies to write the necessary regulations to implement the statute. However, as it has done with so many health and safety laws, OMB, and not the EPA, will end up shaping way the law is implemented.

Sources of OMB Authority

We recognize that the Committee's principle focus is with the reauthorization of the Paperwork Reduction Act. However, because OMB exercises its authority under the Paperwork Reduction Act and the two executive orders in an integrated and consolidated manner, and because the powers assumed by OMB under these provisions are complementary and mutually reinforcing, it is essential that Congress not examine the Paperwork Reduction Act in isolation, but should instead look at it in context.

1. The Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, gives OMB, through the Office of Information and Regulatory Affairs (OIRA), the authority over agency requests for the collections of information -- even those embodied in an agency's substantive regulations. OMB has broadly interpreted this authority to include in the definition of "collection of information" everything from written report forms and questionnaires, to signs, labels, and the transmission of information among nongovernmental parties.

The Act prescribes a procedure to be followed by an agency that contemplates promulgating a rule containing "collection of information requirements." Not later than publication of a Notice of Proposed Rulemaking involving such requirements, that agency must submit a copy of the proposed rule to OMB. Id. 3504(h)(1). OMB then has sixty days to file public comments on the "collection of information requirement[s]" in the proposed rule. Id. 3504(h)(2). In publishing a final rule, the agency must "explain how any collection of information requirement contained in the final rule responds to the comments, if any, filed by the Director [of OMB] or the public, or explain why it rejected those comments." Id. 3504(h)(3). Within sixty days after the publication of the final rule, OMB may disapprove any collection of information requirement contained in the rule if it finds the agency's response to its comments was unreasonable, or if it finds that the agency's modifications of the rule to meet OMB's objections are not adequate. Id. 3504(h)(5)(C) & (D). If a collection of information request is denied, the agency cannot collect the necessary information because no one can be penalized for failing to comply with the information request.

This authority, in effect, gives OMB considerable power to override an agency's judgment about the information the agency needs to perform its substantive mission. Information, research, and enforcement data are crucial for an agency to perform its function.

2. Executive Order 12291

As noted above, OMB's authority under the Paperwork Reduction Act cannot be examined in isolation. The two Executive Orders provide OMB with enormous control over the agencies' development of regulations.

Executive Order 12291 requires all agencies to send proposed and final rules and regulations to OMB for pre-publication review. The Executive Order requires agencies to obtain OMB's permission to publish rules and regulations. It requires the agency to show that both its proposed and final regulations are based on "adequate information concerning the need for and consequences of proposed government action" and that the regulation "will maximize the aggregate net potential benefits to society when the societal costs and benefits are compared." In other words, the regulation must past a strict cost/benefit test. If OMB determines that the regulation is too costly, or the benefits too insubstantial, OMB can reject the proposed regulation. OMB can even prevent an agency from publishing a proposed or final rule until OMB has given the agency its comments and the agency has responded to OMB's satisfaction.

Moreover, the Executive Order does not impose time limits for its review process and does not limit the number of times OMB can disapprove an agency's action. Thus, the Order gives OMB de facto veto power over all agency rulemaking.

3. Executive Order 12498

OMB's authority over agency regulations is further bolstered by Executive Order 12498. This Executive Order enables OMB to tell agencies which proposed rules and regulations it may work on, which studies and hearings it may conduct to determine whether a rule is needed, and what information it may collect to assist it in deciding whether there is any need for a rule.

The Order directs OMB to review on an annual basis each agency's regulatory policies, goals, and objectives and directs agencies to provide OMB with information concerning all significant regulatory actions underway or planned. Under this Order, OMB may reject and return to the agency part or all of a proposed research program that it views as inconsistent with the Administration's policies and priorities or inconsistent with the requirements of Executive Order 12291.

4. OMB's authority over the federal budget

OMB has one other source of power that adds considerably to its already enormous clout -- it controls the agencies' budgets. It is a rare agency that will try to tackle OMB on a regulatory issue when the agency's resources are on the line.

OMB's dominance cannot be doubted. As Jim Tozzi, a former Deputy Director of OMB's Office of Information and Regulatory Affairs (OIRA) put it: "The government works using three things: money, people, and regulations; the agency must get all three from OMB."[1] When asked to name an agency that promulgated a regulation over OMB's objection, then OIRA Administrator, now Circuit Judge, Douglas H. Ginsburg responded, "I don't think that there is such an instance ... No, none."[2] Or, as former OMB Director James C. Miller, III put it "[i]f you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly."[3]

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[1] Olson, The Quiet Shift of Power: Office of Management and Budget Supervision of EPA Rulemaking Under Executive Order 12,291, 4 Va. J. Nat. Res. L. 1, 6 (1984).

Reform is Essential

In our view, OMB's power to displace decision-making authority Congress has assigned to expert agencies must be restricted for seven fundamental reasons: 1) OMB's control is unlawful; 2) OMB's control is unwise policy; 3) OMB is unaccountable; 4) OMB review is too cumbersome; 5) OMB's cost/benefit analysis only measures costs; 6) OMB's control is inherently undemocratic; and 7) the situation has not changed under the Bush Administration.

1) OMB's control is unlawful

OMB's exercise of power under the Executive Orders is unconstitutional. These Executive Orders shift regulatory decision-making power away from the expert agencies, which have been delegated rulemaking authority by Congress, to OMB. Congress did not assign OMB a statutory role in the substantive aspect of rulemaking. Thus, OMB's involvement in the decisions concerning the substance of a regulation is unlawful.

The Constitution does not provide a justification for empowering OMB with a decisive role in the rulemaking process. It is true that the President is obligated to take care that the laws are faithfully executed, and that he may inquire as to the opinions of his administrative officers, may supervise and guide them, and may remove them from office. But the President's authority over subordinate executive officers is far from absolute. There is no authority to suggest that OMB, an agency that reports to the President, may actually dictate an agenda or prescribe the outcome of a rulemaking to an agency charged by Congress with administrative discretion. Nor can an Executive Order override Congress' judgment that a specific office-holder carry out a specific task -- such as determine an agency's priorities or decide the substantive content of a regulation.

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[2] Earley, "What's a Life Worth," Washington Post Magazine, at 11, 37 (June 9, 1985).

[3] Regulation, at 19 (March/April 1981).

Because OMB operates mostly in secret, and does not leave a paper trail, there has been little opportunity to litigate the propriety of OMB's role. As long as OMB's work is carried out behind closed doors, it will be difficult to mount a constitutional challenge to OMB's role. This factor only heightens the need for legislation.[4]

2) OMB's control is unwise policy

OMB control over the regulatory process is also bad policy. It makes little sense for untrained OMB bureaucrats to have the power to second-guess the highly technical judgments made by agency experts. OMB review is conducted by "desk officers," young men and women who generally are trained in business administration, public policy or economics.

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[4] If the Committee wished to explore these legal issues in greater detail, there are a number of excellent materials. Among the most prominent law review articles are those written by Morton Rosenberg of the Congressional Research Service, Rosenberg, Beyond the Limits of Executive Power: Presidential Control of the Agency Rulemaking Under Executive Order 12291, 80 Mich. L. Rev. 193, (1981), and Erik Olson, which is cited in note 1 above.

OMB has few scientists on staff, and certainly none qualified to second-guess OSHA or EPA experts on the type of highly complex technical issues that lie at the core of agency health and safety regulations. Yet, time and again, Congress, through extensive oversight hearings, has exposed instances in which OMB has dictated science to agency experts.

3) OMB is unaccountable

OMB's control denies Congress its vital oversight role. Our Constitution is based on a system of checks and balances, and accordingly, the framers placed a check on the President's exercise of his authority. The Take Care Clause of Article II gives Congress the power to oversee the Executive Branch's execution of the law. But Congress will simply never know when an agency has sought to develop a regulatory initiative but was blocked from doing so by OMB. The whole process generally takes place outside public view.

The same is true for regulations that are submitted to OMB for review under Executive Order 12291, but never emerge. OMB takes the position, and a sharply divided United States Court of Appeals for the District of Columbia Circuit agreed, Wolfe v. Department of Health and Human Services, 839 F.2d 768 (D.C. Cir. 1988) (en banc), that the public should be denied any information as to when OMB begins its review. As a result, neither Congress nor the public can determine whether a proposed rule is pending at the agency, or whether it is languishing at OMB.

4) OMB review is far too cumbersome

OMB review is needlessly costly and bureaucratic, without any discernable benefit to the quality of agency rulemaking. Federal agencies are required to obtain OMB clearance on at least five occasions before a regulation can be issued and enforced: first, when an agency seeks to conduct research and collect information to determine if a problem exists and needs to be addressed (Paperwork Reduction Act and Executive Order 12498); second, when an agency seeks authorization to place a matter on its regulatory agenda, which is the first step an agency takes in developing a regulation (Executive Order 12498); third, when an agency is ready to publish a proposed regulation (Executive Order 12291); fourth, when an agency is ready to publish a final regulation (Executive Order 12291); and fifth, when an agency must secure OMB's approval for the reporting requirements needed to enforce the regulation (Paperwork Reduction Act).

When disputes arise between agencies and OMB, the result is preordained -- as the "toughest kid on the block," OMB always wins. At each stage of the process, OMB has the power to delay, weaken or kill an agency's proposed action. With such broad control over regulations, it is hardly surprising that OMB has managed to choke off all but a few health and safety regulations.

Applying a cost/benefit analysis to OMB's own regulatory review, the present review process resembles a Rube Goldberg machine, the purpose of which is transparent -- to place obstacle after obstacle in front of an agency attempting to fulfill its mission.

It is ironic that an underlying purpose of the Paperwork Reduction Act was to decrease costs and burdens to taxpayers, yet the cumbersome process instituted by OMB adds many extra layers to the regulatory process, each increasing the cost to taxpayers. Every time OMB returns a rule or regulation to the agency there are more meetings, more paper, and more time and energy expended by government employees. Moreover, often times as a result of actions taken by OMB, legal challenges are made on the basis that the final rule is not based on the record, thus adding to the process the cost of Justice Department litigation.

5) OMB's cost/benefit analysis only measures costs

OMB's cost/benefit analysis is a stacked deck that is nothing more than an excuse for "just saying no" to regulations. OMB is great at calculating the costs of regulations, but it makes no effort to fairly estimate the benefits. In reviewing the EPA asbestos phase-down proposal, OMB considered only the cancer deaths prevented by the regulation, valuing each life saved at only $208,000. OMB ignored all the benefits associated with controlling asbestosis -- a serious lung disease -- as well as the overall benefits in reducing medical costs (which are astronomical), increasing productivity, and improving the quality of life. This is not an isolated incident; similar OMB objections have interfered with OSHA rulemakings on ethylene oxide, asbestos, and other toxic substances.

6) OMB's control is inherently undemocratic

Our administrative rulemaking process is a model of openness -- the public has an unqualified right to participate in rule makings, and all agency decisions must be made on the basis of the public record. The Administrative Procedure Act was enacted more than thirty years ago, provides procedures for agencies to promulgate rules and regulations to include public participation and public accountability. It was designed to prevent improper and off-the-record interference in the regulatory process by special interests to ensure that agencies write rules that are based on the public record and that agencies are carrying out Congress' intent. By contrast, OMB control is exerted behind closed doors, with no opportunity for public participation and often no public record of what factors influence OMB's decision. OMB has a long history of consulting regulated industries in secret meetings, and shutting out other interested members of the public. This kind of secrecy is anathema in a democracy like ours.

7) The situation has not changed under the Bush Administration

Despite public statements by administration officials, the evidence shows that the Bush administration is not very different from the Reagan administration in terms of OMB's use of authority to delay, weaken, or kill regulations. OMB continues to use its authority to disproportionately interfere in health and safety regulations -- an area that is one of the least burdensome in terms of paperwork. Four agencies, which issue the bulk of health and safety regulations, were the target of the Reagan Administration -- the Department of Health and Human Services, the Environmental

Protection Agency, the Department of Housing and Urban Development, and the Department of Labor. The statistics show that the Bush administration is following in Reagan's footsteps. In 1988, 25 percent of all government regulations under review at OMB were returned, changed, or agencies withdrew them from OMB; 40 percent of HUD regulations and 51 percent of DOL's were returned, changed or withdrawn. In 1989 the overall number decreased to 22 percent, but the numbers for HUD jumped to 54 percent and at DOL only fell to 50 percent.[5]

Perhaps the most telling illustration is OMB's recent interference with the efforts of the Occupational Safety and Health Administration (OSHA) to issue a standard governing worker exposure to cadmium -- a substance known to cause both cancer and serious and irreversible kidney damage. In light of the magnitude of the health risks posed by cadmium, OSHA has been committed to issuing a standard on an expedited basis since July 1987. OSHA has estimated that for each six months of delay, there may be as many as 250 excess cancer deaths and several thousand cases of kidney dysfunction. But despite the urgent need for a new standard, OMB has stymied and delayed its development. OSHA was able to finally publish a proposed standard on February 6, 1990 -- not because OMB relented -- but because of the pendency of a court order.

As noted earlier, because OMB generally operates behind closed doors it is difficult, if not impossible, to accurately trace OMB's involvement in any particular rulemaking. OSHA, however, has placed in its public docket all of the records exchanged by OSHA and OMB. These records detail the course of OMB's extensive involvement in the formulation of the proposed cadmium standard. Although they are too voluminous to attach to this testimony, the records are available from OSHA as Exhibit 17 (Docket H-057a). They reveal that OMB:

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[5] See OMB Watch Special Report, "Can A Leopard Change Its Spots?," August 2, 1989.

1. Directed OSHA to include language in the preamble -- which OSHA disagrees with but could not so indicate -- raising OMB's doubts about the quantitative risk assessment upon which OSHA bases its proposed standard. OSHA was not free to attribute these doubts to OMB;

2. Directed OSHA, which wanted to propose a new standard of 1 microgram of cadmium per cubic meter of air (ug/m^3) and an action level that would trigger medical monitoring of workers at .5 ug/m^3, to add (against OSHA's judgment) an alternative standard of 5 ug/m^3 and an action level of 2.5 ug/m^3. OMB also directed OSHA to solicit comments on whether the standard should be as high as 40 ug/m^3, again, against OSHA's judgment; and

3. Forced OSHA to include in the preamble nearly two dozen OMB-drafted inserts dealing with the most complex questions relating to epidemiology, risk assessment, and toxicology. These inserts are clearly designed to hamper OSHA's rulemaking effort. According to OMB instructions, none of these inserts reflect that they express OMB's views, but instead are attributed to an unidentified commentator.

These OMB-OSHA documents make it clear that it is business as usual at OMB. As OMB has done for the past decade, it is still exercising final and decisive control over the shape of health and safety regulations, as well as delaying the issuance of such rules at the expense of worker health.[6] These documents also refute OMB's repeated assertion in congressional hearings and elsewhere that it neither displaces agency decision-making nor intrudes into questions of basic science. In the case of cadmium, for many of the fundamental issues in the rulemaking, it was OMB -- not OSHA -- making the final decisions and it was OMB -- not OSHA -- shaping the agency's public pronouncements on key issues of scientific policy.

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[6] These OMB-directed modifications to the proposed standard have enormous consequences for workers. For instance, if OMB succeeds in having OSHA adopt a 5 ug/m3 standard and a 2.5 ug/m^3 action level, that would deny any medical surveillance to an estimated 60,000 to 100,000 workers who are at high risk of kidney damage, as well as seriously weaken the protection against cancer for all cadmium-

Apart from the reservations about OMB interference with rulemaking, which we have catalogued above, OMB's involvement in highly technical, scientific issues is troubling for an additional reason. OMB has no one on staff capable of addressing these difficult scientific issues. As the 1989 GAO Study of OMB's personnel made clear, OMB is institutionally incapable of playing a role in the formulation of scientific policy because it lacks qualified personnel. Indeed, the OIRA staff member handling the risk assessment issues in the cadmium rulemaking is an *economist*.

OMB's forays into the area of risk assessment extend even beyond its involvement with the development of agency rules. Recently, it has come to light that just last month OMB sponsored an international conference that focused on risk assessment, and circulated at that time a paper drafted by an OMB economist entitled: "Current Regulatory Issues in Risk Assessment and Risk Management" -- a paper that takes positions on risk assessment that are at variance with those held by the Office of Science and Technology Policy, OSHA, EPA, and indeed almost every health and safety agency. What is also interesting about this paper -- which sets forth views at odds with

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exposed workers.

mainstream scientific though -- is that it appears as part of OMB's Regulatory Program for 1989, which OMB never published, even though it is required to do so by Executive Order. What is more, many of the criticisms expressed in the paper concerning risk assessment techniques employed by regulatory agencies are indentical to those OMB insisted that OSHA place in its preamble to the proposed cadmium standard. This raises the enormously troubling question of whether OMB is in fact implementing as policy the views expressed in the paper. We have attached to this testimony copies of the article and the agenda at OMB's recent risk assessment conference.

Thus, despite the fact that the names at the agency have been changed, the same problems still exist.

The Solution: Overrule the Executive Orders - Refocus the Paperwork Reduction Act

In our view, setting up procedural constraints for OMB to follow to bring the process into the sunlight addresses the symptoms instead of facing the disease head on. OMB should be stopped from interfering in the process of promulgating substantive rules and regulations. Public Citizen supports Congressional action to completely overrule the Executive Orders and modify the Paperwork Reduction Act to refocus its goals to actually reducing unnecessary paperwork burdens. If this solution is not adopted, then it is absolutely imperative that Congress place strict and enforceable controls on OMB.

Senator Bingaman proposes a solution that takes a prudent first step toward placing controls and limits on OMB"s power to interfere in the regulatory process. I will now address my comments to the Senator's bill.

The Federal Information Resources Management Act, S. 1742

Generally, the bill has a number of features that place meaningful and important constraints on OMB regulatory review:

1. Public record of OMB involvement. The bill drags OMB into the sunlight and compels it to operate on the public record. The bill requires that a public record of agency rulemaking activities undergoing review be available as soon as the agency submits materials to OMB. The record is to include draft regulations, all written materials exchanged between OMB and the agency and all material relating to rulemaking that OMB receives from nongovernmental persons. The record also must contain a list of all meetings involving the Office of Information and Regulatory Affairs and nongovernmental persons.

2. Time limitations. Senator Bingaman's bill would prohibit OMB from sabotaging rules through delay. The bill imposes time limits to prevent OMB from continuing to be a "black hole" into which rules are submitted but never emerge. In addition, however, I would suggest some minor technical amendments: a) any extension of time should be signed by the Administrator of OIRA and made part of the public record, b) clarify the definition between "major" and "nonmajor" rules, and c) if OMB violates these time limitations, the rule should be deemed approved (similar to the practice under the Paperwork Reduction Act).

3. Limits on communications with persons who are not employees

of the Federal government. The bill would help prevent lower level employees, including "desk officers" who have virtual veto power over regulations, from being unduly influenced by the industry being regulated. It would prohibit OMB employees, other than the Administrator and the Deputy Administrator of OIRA, from communicating with persons outside government on matters related to regulatory review. The best way to implement this provision would be to require OMB to log communications with the public and agency personnel and send them to the agency to be made part of both the agency and OMB's public record.

4. Promotes reduction in paperwork in particular areas. The bill mandates OMB to focus on reducing paperwork in the most burdensome areas -- government procurement and taxes -- and away from areas with the least burdensome paperwork requirements -- health and safety regulations.

5. Curbs on OMB's ability to review paperwork requirements of ongoing regulations. Under current law, OMB can interfere with the implementation of existing rules by reviewing the paperwork requirements necessary for enforcing the regulation. Senator Bingaman's bill creates new procedures for review of regulatory paperwork to minimize OMB's ability to arbitrarily change or repeal regulations already in force.

6. Two year reauthorization. Senator Bingaman's bill provides for a two year reauthorization. Two years is a suitable amount of time between congressional authorizations. This will ensure more vigilant congressional oversight of OMB's exercise of authority. Two

years provides sufficient time for both Congress and OMB to assess the changes brought about by this legislation and propose fine-tuning, if necessary. Yet, at the same time, by not requiring OMB to constantly come before Congress for reauthorization, it allows OMB some stability.

Additional Necessary Reforms

All of the reforms contained in Senator Bingaman's bill are positive steps necessary to curb abuse by OMB. But more needs to be done. The bill falls short of rectifying some of the most egregious problems caused by OMB. We urge this committee to consider the following additional necessary measures:

1. Prohibiting OMB from considering or relying on any factors or criteria other than those which the agency head responsible for promulgating the rule is authorized to consider. This would help prevent OMB from overriding Congress' judgment about what factors should be weighed when formulating regulatory policy. Also, it would prohibit OMB from using its one-sided cost/benefit analysis.

2. Prohibit any OMB review until after a regulation has been proposed. OMB's efforts to obstruct regulatory initiatives now take place before a proposal has even been published and the public has any idea that an agency is attempting to address a problem. Once a proposal has been released to the public, it will be far more difficult for OMB to weaken it or delay the issuance of a final rule. By forbidding OMB from reviewing pre-proposal initiatives, Congress can blunt OMB's power over an agency's rulemaking. This reform would also help to streamline and simplify the system. It will be

difficult for anyone -- even the most stalwart defenders of OMB -- to argue in favor of the present system of a least five-tiers of review. To the extent it has any value at all, regulatory review must be prompt, and not the open-ended, cumbersome process it is now.

3. Eliminate the regulatory sunset. Currently, information collection requirements expire after three years; OMB can then review the necessity of the requirement. The proposed bill prescribes new procedures which, on the positive side, may focus attention on OMB's action. However, the prescribed procedures are undermined by the fact that the bill allows OMB to indiscriminately review information collection activities at any time merely by providing public notice explaining why it is doing so. This three year sunset provision is unnecessary and cumbersome and places a needless burden on OMB and the agency. Anyone burdened by an out-dated information collection requirement can petition the agency to either amend or rescind the requirement.

4. Require justification of denial of agency paperwork requests. To ensure that an OMB disapproval does not interfere with the ability of an agency to perform its substantive mission, OMB should be required to bear a heavy burden of showing that the information sought by the agency would have no practical utility, and that the agency's justification for the request is unreasonable or that it clearly disregards the requirements of the Act. Moreover, to ensure that OMB does not intrude into the policy areas entrusted by Congress to the agencies and not OMB, OMB should be barred from even considering the underlying policy decisions that lead the agency to

request the information.

Finally, there must be some balance injected into all Paperwork Act reviews. At present, OMB considers only the burdens imposed by paperwork -- an inquiry largely unchanged by Senator Bingaman's bill. But, in order to get a fair assessment of the utility of the information to be collected, OMB must also be required to evaluate the benefits of gathering the information. Without consideration of both sides of the equation, OMB will continue to have the authority to disapprove information requests that, while perhaps burdensome, are more than justified because of the benefits.

5. Reiterate Congressional intent that the Paperwork Reduction Act does not apply to signs, labels, and hazard information distributed by nongovernmental agencies. The United States Court of Appeals for the Third Circuit in United Steelworkers of America v. Pendergrass, 855 F.2d 108 (1988), (Supreme Court appeal pending) held that the Paperwork Reduction Act does not cover signs, labels and hazard information distributed by nongovernmental agencies and not furnished to a government agency. Codifying this ruling would reaffirm Congress' clear intent when it first enacted the Paperwork Reduction Act in 1980 that such information requirements are not within OMB control.

6. Eliminate the barrier to judicial review. The Paperwork Reduction Act's restriction on judicial review should be repealed. Currently, OMB's actions under the Paperwork Reduction Act enjoy sacred status. While all executive branch agencies -- including OMB and even the President -- can be sued, under the Paperwork Reduction

Act, OMB stands alone, unaccountable to no one. Judicial review places the only external check on OMB's activities, and there is no reason to deny those who believe that they have been injured by OMB their day in court.

House Government Operations Committee's Solution

Finally, we understand that Chairman John Conyers and the ranking minority member Congressman Frank Horton intend to address these regulatory review reforms in an "executive agreement." In general, we support the substance of this agreement because it would incorporate a number of positive reforms. However, this solution is problematic because it is extremely difficult to enforce, it leaves the public out of the process, and has proven unsuccessful in the past.

Placing these reforms in an "executive agreement" allows only Congress to make certain that the agreement's provisions are fulfilled. It suggests that there are only two interested players -- Congress and OMB -- in the regulatory process. The public is left with no input or oversight functions.

A similar 1986 agreement with then-OIRA Administrator Wendy Gramm has not been fully honored. Under this agreement, all agency draft submissions were to be made reviewable once the Regulatory Program was published. However, in 1989, no Regulatory Program was published. Moreover, according to the Gramm agreement, OMB is required to make available, upon written request, all written correspondence with a head of an agency regarding a regulatory review. But, in fact, OMB does not write to heads of agencies, instead it corresponds with lower level employees.

In sum, although we agree with much of the substance of the House Committee proposal, we are deeply concerned that these reforms will be placed in an unenforceable agreement rather than a legally binding statute. If Congress chooses this type of solution, an essential element of this agreement must be a strict reporting requirement to assure that Congress and the public can adequately oversee OMB's compliance.

Mr. Chairman, thank you again for the opportunity to testify. We applaud your initiative to carefully consider this important issue and strongly encourage you to take the lead to protect the lives and health of the public.

Current Regulatory Issues in Risk Assessment and Risk Management

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*The views expressed in this paper are the authors' and do not necessarily reflect those of the Office of Management and Budget.

In an earlier issue of the *Regulatory Program*, we discussed how the Federal Government assesses and manages risks to public health and safety, and how these procedures affect regulatory policy.[20] During the intervening years, interest in the reform of risk assessment, management, and communication has intensified as the scientific and policy communities continue to struggle with these issues.

In 1983 the National Academy of Sciences (NAS) studied the process of managing risk in the Federal Government. NAS offered the following two recommendations, among others:

- *Recommendation 1:* Regulatory agencies should take steps to establish and maintain a clear conceptual distinction between assessment of risks and the consideration of risk management alternatives; that is, the scientific findings and policy judgments embodied in risk assessments should be explicitly distinguished from the political, economic, and technical considerations that influence the design and choice of regulatory strategies.[21]
- *Recommendation 2:* Before an agency decides whether a substance should or should not be regulated as a health hazard, a detailed and comprehensive written risk assessment should be prepared and made publicly available. This written assessment should clearly distinguish between the scientific basis and the policy basis for the agency's conclusions.[22]

These two principles enjoy widespread support from professional risk-assessment practitioners.[23] They also have been embraced by a number of Federal agencies, including the Office of Science and Technology Policy (OSTP), the Environmental Protection Agency (EPA), and the Department of Health and Human Services (HHS).[24]

Despite these signs of progress, much more needs to be done. Policymakers often receive less information than they need to make responsible risk-management choices. Important policy decisions continue to be embedded within current risk-assessment procedures. The continued intermingling of science and policy in risk assessment makes it difficult to distinguish serious risks from trivial hazards. Since quantitative risk assessment plays such a significant role in risk management, there is a continuing need to comply with the NAS recommendations, both to assure an effective ordering of regulatory priorities and to maintain public confidence in the risk management process.

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[20] U.S. Office of Management and Budget, *Regulatory Program of the United States Government, April 1, 1986–March 31, 1987*, Washington, DC: Executive Office of the President, 1986 (hereinafter, *1986-1987 Regulatory Program*), pp. xix-xxvi.

[21] National Academy of Sciences, *Risk Assessment in the Federal Government: Managing the Process*, Washington, DC: National Academy Press, 1983 (hereinafter, *NAS Risk Management Study*), p. 151.

[22] Ibid., p. 153.

[23] See, e.g., Lester B. Lave, *The Strategy of Social Regulation: Decision Frameworks for Policy*, Washington, DC: Brookings, 1981; Lester B. Lave, "Methods of Risk Assessment," Chapter 2 in *Quantitative Risk Assessment in Regulation*, Lester B. Lave, ed., Washington, DC: Brookings, 1982, esp. pp. 53–54; Howard Kunreuther and Lisa Bendixen, "Benefits Assessment for Regulatory Problems," and Baruch Fischhoff and Louis Anthony Cox, Jr., "Conceptual Framework for Regulatory Benefits Assessment," Chapters 3 and 4, respectively, in *Benefits Assessment: The State of the Art*, Judith D. Bentkover, Vincent T. Covello, and Jeryl Mumpower, eds., Dordrecht, Netherlands: D. Reidel, 1986, pp. 44–45, 59–61.

[24] See U.S. Office of Science and Technology Policy, "Chemical Carcinogens: A Review of the Science and Its Associated Principles," Principle 29, 50 FR 10378; (March 14, 1985),(hereinafter, *OSTP Risk Assessment Guidelines*); U.S. Environmental Protection Agency, "Guidelines for Carcinogen Risk Assessment," 51 FR 34001 (September 24, 1986) (hereinafter, *EPA Carcinogen Risk Assessment Guidelines*); U.S. Department of Health and Human Services, *Risk Assessment and Risk Management of Toxic Substances*, April 1985, p. 20.

In this section we briefly describe several important areas which continue to pose significant problems in preparing quantitative risk assessments. These problems arise in estimates of both the measurement of hazard and the extent of human exposure. We emphasize potentially carcinogenic chemicals because the prevention and cure of cancer plays a major role in health policy issues.

ALTERNATIVE RISK ASSESSMENT METHODOLOGIES

Risk assessments of chemical substances in general (and of possible carcinogens in particular) consist of a mixture of facts, models, and assumptions. Facts are beyond dispute, of course, but there is considerable debate concerning the scientific merits of the models and assumptions commonly used in risk assessments. In some cases, a scientific consensus has developed to support a particular model or assumption. In other instances, however, certain models and assumptions are relied upon because they reflect past practices rather than the leading edge of science. Furthermore, a scientific basis for several of the most critical models and assumptions simply does not exist.

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Most scientists agree that these models and assumptions impart a conservative bias; that is, they lead to risk estimates that are much higher than the most likely level of risk. In this section we catalogue some of the more significant places at which conservative biases emerge in quantitative risk assessment.

Contemporary risk assessment relies heavily upon animal bioassay and epidemiology. Each approach has theoretical advantages and disadvantages. In practice, both can be abused to achieve preestablished conclusions.

Animal Bioassay

Animal testing enables scientists to estimate ri *ex ante*, before human health effects material whereas epidemiological studies can only detect such effects *ex post*. In addition, animal tests can be conducted under tightly controlled laboratory conditions. This gives more reliable estimates of exposure and avoids many of the confounding factors that often plague epidemiological investigations. The relatively short lifetimes of experimental mammals such as rats and mice allow scientists to ascertain the possible effects of long-term exposure in just a few years.

Animal testing suffers serious limitations, however, arising from certain critical assumptions in the methodology. The most important of these assumptions is that results can be meaningfully extrapolated from test animals to humans.[35] Despite its routine application, there is no accepted scientific basis for this assumption. Some scientists believe that it should not be used in assessing human health risks.[36]

Another critical limitation is the reliance on very high doses to generate adverse effects in te animals.[37] A mathematical model must be used bridge the gap between these high-dose exposures and the low-dose exposures more typically faced by people. Many different mathematical models can be constructed to fit the data at high doses. These models often vary enormously, however, in their predictions of risk at low doses.

Beyond these unavoidable methodological constraints, the results of animal bioassays may be subject to conflicting scientific interpretation or strongly influenced by the choice of research method. Tissue preparation and histology present obvious opportunities for error, as experts may disagree as to how slides should be interpreted.[38] This problem generally is not significant at high doses, where malignancies are often obvious. At low doses, however, pathologists often differ in how they distinguish tumors from hyperplasia. Subjectivity cannot be avoided where such interpretations of the data must be made.[39]

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[35] *OSTP Guidelines*, Guideline 8, p. 10376.

[36] See, e.g., Bruce Ames, Renae Magaw, and Lois Swirsky Gold, "Ranking Possible Carcinogenic Hazards," *Science*, Vol. 236, April 17, 1987; Gio Batta Gori, "The Regulation of Carcinogenic Hazards," *Science*, Vol. 208, April 18, 1980.

[37] *OSTP Guidelines*, Guideline 11, p. 10377.

[38] In the original analysis of the rat bioassay used to derive the dose-response function for dioxin, 9 of 85 controls were said to develop liver tumors. An independent review of this data resulted in 16 of the 85 controls being classified as having such tumors. See U.S. Environmental Protection Agency, *A Cancer Risk-Specific Dose Estimate for 2, 3, 7, 8-TCDD, Appendix A*, EPA/600/6-88/007Ab, June 1988 (hereinafter, *Dioxin Risk Assessment Appendix A*), pp. 2-3.

[39] Colin N. Park and Ronald D. Snee, "Quantitative Risk Assessment: State-of-the-Art for Carcinogenesis," Chapter 4 in *Risk Management of Existing Chemicals*, Rockville, MD: Government Institutes, 1983, p. 86.

Epidemiology

Epidemiology is attractive because it largely avoids these two problems. It focuses on observable human health effects instead of on hypothesized outcomes based on animal experimentation, and it relies upon real-world exposures to generate empirical data. Many of the serious problems associated with animal studies can be avoided, allowing researchers to develop risk estimates that are directly related to human health.

Unfortunately, epidemiological research suffers from its own set of limitations. For example, retrospective studies often have difficulty correlating morbidity and mortality with exposure to specific substances. Exposure data are commonly lacking, incomplete, imprecise, or affected by systematic recall or selection biases. Furthermore, the risks these studies seek to detect are often very small relative to background, thus making statistically significant effects difficult to observe. When health effects are latent, correlating exposures to illness is even harder to do.

Besides these methodological limitations, epidemiological studies occasionally suffer from outright bias. Many studies employ scientifically questionable procedures often aimed at demonstrating positive relationships between specific substances and human illness.[80] Some researchers use inappropriate statistical procedures to "mine" existing databases in search of associations. This increases the likelihood that observed statistical relationships are merely spurious artifacts. One result of these phenomena is that epidemiological studies often display contradictory results.[81]

Despite these constraints, properly conducted animal bioassays and epidemiological studies both have useful roles to play in quantitative risk assessment. Indeed, they are complementary. The usual weaknesses of epidemiological investigations—unreliable exposure data, confounding effects—are readily avoided in laboratory experiments on animals. The weaknesses of animal bioassays—high- to low-dose extrapolation, animal-to-man conversion—do not arise in epidemiological studies. Careful risk assessment incorporates both types of analysis to ensure that the emerging picture of human health risk is as complete as possible, and that inferences derived from this picture are themselves internally consistent.

ISSUES IN RISK ASSESSMENTS DERIVED LARGELY FROM ANIMAL BIOASSAYS

Animal bioassays tend to dominate current risk assessments. An important reason for this is that the derivation of dose-response relationships is a critical regulatory motive for performing quantitative risk assessment. Animal studies are ideally suited to serve this purpose by virtue of the controlled conditions under which dose and response can be calibrated. Epidemiological studies often are relegated to providing merely a "reality check" to ensure that the implications of animal bioassays are plausibly consistent with real-world experience. Because of this heavy emphasis on animal testing, we focus on several major problems that arise with respect to risk assessments primarily based on the results of animal bioassays.

The Use of Sensitive Test Animals

To enhance the power of animal tests, scientists typically rely on genetically sensitive test animals. It is unclear whether these species accurately mimic biological responses in humans.

Some test species are extremely sensitive. For example, approximately one-third of all male B6C3F1 mice, a common test species, spontaneously develop liver tumors.[82] The same phenomenon occurred in an important bioassay concerning dioxin using female Sprague-Dawley (Spartan) rats. Tumors observed in dosed animals were predominantly located in the liver. However, approximately one-fifth of the animals in the control group also developed liver tumors.[83] The relevance of elevated liver tumors in hypersensitive species has been questioned by scientists and is not universally considered probative evidence of carcinogenicity. Nevertheless, cancer risk assessments often proceed on the assumption that these data are sufficient to conclude that a substance is indeed a carcinogen.[34]

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[80] Alvan R. Feinstein, "Scientific Standards in Epidemiological Studies of the Menace of Daily Life," *Science*, Vol. 242, December 2, 1988, pp. 1257-1263.

[81] Linda C. Mayes, Ralph I. Horowitz, and Alvan R. Feinstein, "A Collection of 56 Topics with Contradictory Results in Case-Control Research," *International Journal of Epidemiology*, Vol. 17, No. 3 (1988), pp. 680–685.

[82] Ames et al., *(op. cit.)*, p. 276.

[83] *Dioxin Risk Assessment Appendix A*, pp. 2–3.

The reliance on sensitive test animals also biases risk assessments in a more subtle way. It establishes powerful incentives to search for and develop increasingly sensitive test species. As test animals become more sensitive, repeated testing using identical protocols will tend to result in higher and higher estimates of risk even if all other factors are held constant.

Selective Use of Alternative Studies

In their respective risk assessment guidelines, both OSTP and EPA recommend that relevant animal studies should be considered irrespective of whether they indicate a positive relationship.[35] In practice, however, studies that demonstrate a statistically significant positive relationship routinely receive more weight than studies that indicate no relationship at all.[36] For example, the pesticide daminozide (Alar) and its metabolite unsymmetrical 1,1-dimethylhydrazine (UDMH) recently received B2 classifications ("probable human carcinogen"). Each of these classifications was based on a single positive animal bioassay.[37] Overcoming such a classification requires, at a minimum, two "essentially identical" studies showing no such relationship.[38] In the case of Alar and UDMH, however, a more stringent test was apparently applied: Three-high quality negative studies showed no significant effects; these studies appear to have received little or no weight in the classification decision.[39]

Selective Interpretation of Results

Risk assessment guidelines generally give the greatest weight to the most sensitive test animals. Thus, if a substance has been found to cause cancer in one species or gender but shown to exhibit no effects elsewhere, the results pertaining to the sensitive species or gender typically will be used to develop estimates of risks to human health. For example, if male mice develop cancer from a substance but female mice and rats of both genders do not, then the results from the male mouse often will be used to derive estimates of cancer risks to humans.[40]

Once a positive result has been obtained in an animal bioassay, a substance often will be provisionally classified as a probable human carcinogen. The statistical burden of proof shifts to the no-effect hypothesis. Because it is logically impossible to prove a negative, however, this practice establishes a virtually irrebuttable presumption in favor of the carcinogenesis hypothesis.

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[34] See Ames *et al.*, *(op. cit.)*, p. 276 (arguing that such data are irrelevant); *OSTP Guidelines,*, Guideline 8, p. 10377 (concluding that such data "must be approached carefully"); and *EPA Carcinogen Risk Assessment Guidelines*, p. 33995 (making the policy judgment that such data are sufficient evidence of carcinogenesis).

[35] See *OSTP Guidelines*, Guideline 25, p. 10378; *EPA Carcinogen Risk Assessment Guidelines*, p. 33995.

[36] See *EPA Carcinogen Risk Assessment Guidelines*, p. 33999–34000. A single animal test that shows a positive result "to an unusual degree" (p. 33999) is sufficient to warrant at least a B2 classification ("probable human carcinogen"), even if this result occurs in a species known to have a high rate of spontaneous tumors. A strong animal bioassay or epidemiological study showing no evidence of carcinogenic effect cannot overcome this presumption (p. 34000).

[37] See "Second Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-dimethylhydrazine)," Memorandum from John A. Quest to Mark Boodee, U.S. Environmental Protection Agency, OPTS, May 15, 1989 (hereinafter, *Alar/UDMH Internal Peer Review No. 2*). This internal OPTS panel reviewed several recent studies on Alar and UDMH.

One study of Alar yielded a statistically significant increase in common lung tumors in mice, but only for one of three dosage levels. Results were not statistically significant at one higher and two lower dosages, and controls also displayed unusually high tumor incidence. 90% of the lung tumors in dosed mice were benign, versus 89% in the controls.

One study of UDMH yielded statistically significant increases in common lung and uncommon liver tumors in mice, but only for the higher of two dosages. 97% of the lung tumors in dosed mice were benign, versus 100% in the controls. 29% of the liver tumors in dosed mice were benign; no tumors were observed in the controls.

Prior studies that purported to show a carcinogenic response had been judged inadequate by EPA's Scientific Advisory Panel, an external peer review group. The Office of Pesticides and Toxic Substances (OPTS) panel noted that a different internal EPA risk assessment panel (the Carcinogen Assessment Group) considered these studies sufficient to justify B2 classifications when it evaluated them for EPA's O′ of Solid Waste and Emergency Response. Despite the scientific controversy, the OPTS panel interpreted these prior studies as "supporting evidence" under EPA's risk assessment guidelines.

[38] See *EPA Carcinogen Risk Assessment Guidelines*, p. 33995 (establishing the need for replicate identical studies showing no effect), and p. 33999 (establishing the minimum requirement of two well-designed studies showing no increased tumor incidence to warrant a "no evidence" determination).

[39] *Alar/UDMH Internal Peer Review No. 2*, pp. 6, 8, 9. EPA's scheme for carcinogen classification is itself an issue among scientists. See, e.g., U.S. Environmental Protection Agency, Risk Assessment Forum, *Workshop Report on EPA Guidelines for Carcinogen Risk Assessment*, EPA/625/3-89/015, Washington, DC: Author, March 1989, pp. 21-26.

[40] See *EPA Carcinogen Risk Assessment Guidelines*, p. 33997 (data from long-term animal studies showing the greatest sensitivity should generally be given the greatest emphasis).

Severe Testing Conditions

Current risk assessment protocols require the use of very high doses. Unfortunately, high doses are often toxic for reasons unrelated to their capacity to cause cancer. A common procedure is to use what is called the maximum tolerated dose (MTD), which is the most that can be administered to a test animal without causing acute toxicity. At such exposure levels, substances often cause severe inflammation and chronic cell killing. For example, formaldehyde causes nasal tumors in rats when administered in high doses. However, MTD administration severely inflames nasal passage tissues. It is therefore unclear whether the cancers induced are caused by formaldehyde *per se* or by the toxic effects of high doses.

Results such as these have caused some scientists to question the validity of rodent tests performed at the MTD for estimating human health risks that arise from exposure at low doses.[41] By combining very high doses with highly sensitive test subjects, some animal bioassays are predisposed to discover apparent carcinogenic effects.

Relevance of Animal Bioassay Results

An important reason why animals vary in their sensitivity is that they have different physiologies, metabolic processes, reproductive cycles, and a host of other species-specific characteristics that largely result from unique evolutionary paths. Each of these factors needs to be carefully considered in evaluating the significance of animal data with respect to human health. This is recognized in both the OSTP and EPA guidelines, but it is often neglected when the guidelines are applied to specific substances.[42]

The most important assumption in this regard is that animal test results can be meaningfully extrapolated to humans. A recent study of chemicals tested under the auspices of the U.S. National Toxicology Program shows that this assumption can lead to the erroneous classification of many chemicals as probable human carcinogens.[43] Positive associations have been obtained in either rats or mice for half of 214 chemicals tested. However, results were consistent across these two genetically similar species only 70 percent of the time. If it is assumed that rodent bioassays have the same sensitivity and selectivity with respect to human carcinogens as they do between rodent species, and it is further assumed that 10 percent of all chemicals are in fact human carcinogens, then 27 of every 100 randomly selected chemicals would be misclassified as probable human carcinogens. Only three chemicals would be misclassified as noncarcinogens. Thus, "false positives" would be 9 times more common than "false negatives."[44]

Of course, this ratio of false positives to false negatives reflects highly conservative "upper-bound" assumptions concerning sensitivity and selectivity. Given the high degree of similarity between rats and mice and the limited resemblance between rodents and humans, the sensitivity of rodent bioassays is probably much lower than 70 percent. Furthermore, other research indicates that selectivity may be as low as five percent. Adjusting only for this lower selectivity suggests that false positives are almost 30 times more common than false negatives. This raises serious questions concerning the practical utility of animal bioassays for the purpose of quantitative risk assessment.[45]

Other factors should also be considered when relying upon animal bioassay results as the primary basis for quantitative risk assessments. For example, certain substances are toxic or even carcinogenic by one pathway but not by others. Nevertheless, animal bioassay protocols often emphasize the most sensitive pathway. As long as human exposure is likely to arise the same way, then this choice may be reasonable. However, the pathway to which the test species is sensitive sometimes reflects an exposure route that is implausible or irrelevant for humans. For example, formaldehyde causes nasal tumors in rats at 12 times the rate observed in the next most sensitive animal species. This extreme sensitivity may be related to the fact that rats breathe only through the nose.

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[41] See, e.g., Ames *et al.*, *(op. cit.)*, pp. 276-277.

[42] *OSTP Guidelines*, Guideline 25, p. 10378; *EPA Carcinogen Risk Assessment Guidelines*, p. 34003 (responding to comments on the draft guidelines and affirming agreement with OSTP Guideline 25).

[43] Lester B. Lave, Fanny K. Ennever, Herbert S. Rosenkranz, and Gilbert S. Omenn, "Information Value of the Rodent Bioassay," *Nature*, Vol. 336 (December 16, 1988), pp. 631–633.

[44] *False negatives* occur when a test fails to detect effects when they are in fact present. *Sensitivity* refers to the capacity of a test to minimize false negatives. *False positives* occur when a test appears to detect effects that in fact are absent. *Selectivity* refers to a test's ability to minimize false positives. The 9 to 1 ratio of false positives to false negatives calculated by Lave *et al.* assumes that both selectivity and sensitivity equal about 70%.

[45] Lave *et al.*, *(op. cit.)*, p. 631. Adjusting also for less sensitivity reduces the ratio of false positives to false negatives. For example, if sensitivity is only 10 percent and all other parameters remain unchanged, then this ratio declines to 9.5 to 1. However, this implies that both types of statistical errors are rampant, which raises questions concerning the overall utility of animal bioassays. This is, in fact, precisely the concern raised by Lave *et al.*, *(op. cit.)*, who conclude that such tests are cost-effective investments in information only under extraordinary conditions.

There may be important differences between animals and humans that make specific tumors irrelevant. For example, some chemicals cause cancer in the zymbal gland of the rat; because humans lack such a gland it is unclear whether these results matter in estimating human health risk. Other substances induce cancer through biochemical mechanisms not found in humans.

A greater controversy surrounds the question whether the same weight should be given to benign and malignant tumors. The scientific consensus is that benign and malignant tumors should be aggregated only when it is scientifically defensible to do so.[46] In practice, however, benign and malignant tumors are routinely aggregated unless a strong case can be made against the practice.[47] The difference between these default assumptions is significant; one approach counts only carcinomas that are present, whereas the other counts tumors that *might become* carcinomas. In an extreme case, a substance that unambiguously promotes benign tumors but never causes cancer could be classified as a probable human carcinogen simply because of this assumption.

In addition, tumor incidence is commonly pooled across sites to obtain a total estimate of carcinogenic effects.[48] This implicitly assumes that cancer induction is independent across sites and not the result of either metastasis or the same biological mechanism. Given the extreme sensitivity of test species and the regular use of MTD administration, other explanations for tumors occurring at multiple sites appear just as plausible.

The Choice of Dose-Response Model

No single mathematical model is accepted as generally superior for extrapolating from high to low doses.[49] Consequently, Federal agencies often use a variety of different models. Rather than being a scientific footnote to the risk assessment process, however, the choice of model is actually an important policy issue. The multistage model appears to be the most commonly used method for estimating low-dose risks from chemicals, and there are two major sources of bias embedded in this choice: its inherent conservatism at low doses, and the routine use of the "linearized" form in which the 95 percent upper bound is used instead of the unbiased estimate.

The *multistage model* essentially involves fitting a polynomial to a data set, with the number of "stages" identified by the number of terms in the polynomial. Since animal bioassays rarely have more than three dose levels, it is rare to see applications of the multistage model with more than two stages. Although the multistage model enjoys some scientific support because it is compatible with multistage theories of carcinogenesis, in practice the model fails to include enough stages, due to the absence of sufficient alternative exposure cohorts.

Typically, the multistage model yields risk estimates that are higher than most other models. For example, when five different dose-response models were analyzed in a recent risk assessment of cadmium, estimates of cancer risks at moderate doses varied by a factor of 100. This difference among estimates widened as doses declined toward the very low levels within the range of regulatory concern. At very low doses, two of the five models predicted excess lifetime cancer risks greater than one in one thousand (10^{-3}), a risk oftentimes regarded by policymakers as unacceptable. However, two other equally plausible models predicted essentially no excess cancer risk at all. Since none of the five models offers a scientifically superior basis for deriving low-dose risks, the choice of model is therefore a pivotal policy decision. The accepted practice under these circumstances is to develop a subjectively-derived "best" estimate while fully informing decisionmakers as to the extent of uncertainty surrounding it.[50] In the cadmium case, as in most others, this practice was not followed: Estimates of the number of statistical cancers that would be prevented by regulation were presented based only on the multistage model.

The *linearized multistage model (LMS)* is a special version of the multistage model in which the 95 percent upper confidence interval of the linear term is used instead of the unbiased estimate. That is, the model identifies the largest value for the linear term that cannot be rejected at the 95 percent confidence level and uses it in place of the unbiased estimate. Assuming that the model has been correctly specified, there is only a five percent chance that the true risk exceeds this level.

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[46] *OSTP Guidelines*,, p. 10376.

[47] *EPA Carcinogen Risk Assessment Guidelines*,, p. 33997.

[48] *Ibid.*

[49] *OSTP Guidelines*, Guideline 26, p. 10378; Ames et al., *(op. cit.)*, p. 278.

[50] See, e.g., *OSTP Guidelines*,, Guidelines 27, 29, and 31, p. 10378; *EPA Carcinogen Risk Assessment Guidelines*,, pp. 33999, 34003.

The popularity of the LMS derives from the fact that small changes in the number of tumors discovered in the lowest dose cohort often create substantial fluctuations in the unbiased estimate of the linear term. The 95 percent upper bound, however, is relatively insensitive to such variations in tumor incidence. Coefficient estimates thus are stable for a relatively wide range of tumor incidence data. Another often-cited advantage of the LMS is that it provides a yardstick for comparing potencies across chemicals.[61] Finally, the linearized multistage model is often defended on the ground that it is prudent to err on the side of caution when dealing with potentially carcinogenic chemicals.

None of these purported advantages has a sound biological or statistical basis. It is a fundamental axiom of statistics that unbiased estimates are generally preferred to biased ones. Using the upper bound instead of the unbiased estimate exaggerates underlying errors instead of eliminating them. It inflates risk estimates by a factor of two or three in most cases, and in some instances by several orders of magnitude.[62]

The multistage model does indeed generate unstable coefficients of the linear term when tumor incidence varies slightly at lower administered doses. However, such instability generally reflects misspecification of the dose-response model—that is, the real dose-response relationship is different from what the multistage model constrains it to be. If the problem is a misspecified model, then it is inappropriate to use either the unbiased estimate or an upper bound that has been statistically derived from it. Instead of selecting biased estimates, the appropriate statistical procedure is to use a better model.

Finally, the built-in conservatism of the multistage model may well provide a margin of safety. However, the magnitude of this margin of safety varies from substance to substance because of variations in the suitability of the multistage model, particularly the linearized version of it. Use of the multistage model thus introduces a margin of safety of unknown magnitude in each risk assessment. This practice cloaks a fundamental policy decision concerning the treatment of uncertainty behind the veil of science. Instead, risk assessments should strive to provide statistically valid unbiased estimates combined with measures of uncertainty. The establishment of margins of safety ought to be the province of policymakers.[63]

Alternative models are available, of course, and they have been applied in many quantitative risk assessments. Because proper model specification is the foundation of applied statistical methodology, alternatives to the multistage model should be expected and encouraged. Indeed, innovation is the hallmark of scientific inquiry; policies that institutionalize any particular model specification effectively stifle scientific advancement.

Unfortunately, models other than the multistage model are often discouraged in practice.[64] Agencies may require substantial scientific evidence in support of an alternative model before allowing it to be used. Alternative models thus face a burden of demonstrating scientific plausibility that the multistage model cannot satisfy. Even in the extraordinary case in which this burden can be satisfied, estimates may be required from the linearized multistage model as well.[65]

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[61] U.S. Environmental Protection Agency, *A Cancer Risk-Specific Dose Estimate for 2, 3, 7, 8-TCDD*, EPA/600/6-88/007Aa, June 1988 (hereinafter, *Dioxin Risk Assessment*), pp. 45–46.

[62] Albert L. Nichols and Richard J. Zeckhauser, "The Perils of Prudence: How Conservative Risk Assessments Distort Regulation," *Regulation*, November/December 1986, pp. 13–24, esp. p. 17.

[63] *NAS Risk Management Study*,, p. 151; *OSTP Risk Assessment Guidelines*,, Principle 29, p. 10378; *EPA Carcinogen Risk Assessment Guidelines*,, p. 34001.

[64] Ames *et al.*, *(op. cit.)*, p. 278 (continued reliance on linear models despite the accumulation of evidence against linearity); and Lester B. Lave, "Health and Safety Risk Analysis: Information for Better Decisions," *Science*, Vol. 236, April 17, 1987, pp. 291–295, esp. p. 292 (agencies often resist modeling improvements and data that yield lower risk estimates).

[65] *EPA Carcinogen Risk Assessment Guidelines*, pp. 33997–33998. "In the absence of adequate information to the contrary, the linearized multistage procedure will be employed. . . . Considerable uncertainty will remain concerning responses at low doses; therefore, in most cases, an upper-limit risk estimate using the linearized multistage procedure should also be presented."

The potential human health threat posed by dioxins provides an excellent example of the problem of model selection. Using the same linearized multistage model, EPA, the Centers for Disease Control (CDC), and the Food and Drug Administration (FDA) have arrived at upper-bound risk estimates that span an order of magnitude.[56] Depending on the data and assumptions used, the linearized multistage model predicts unit risk factors that vary by as much as 1,200, with the three risk estimates mentioned earlier clustered at the high end of the range.[57] Risk assessments based on different models have led other governments to establish unit risk factors that are a thousand times less stringent than the most commonly used of these three; one study suggests that this particular estimate overstates the most likely risk estimate by a factor of almost 5,000.[58]

Conversion from Animals to Humans

Once risk has been extrapolated to low doses in rodents, scientists must convert them to human dose-equivalents. The two most common approaches involve the use of body-weight or surface-area conversions, and there are scientific reasons for choosing either approach in individual cases. The surface-area approach leads to estimates of risk that are between 7 and 12 times greater than those based on the body-weight method, depending upon the test species. Despite the ambiguity of the underlying science, the more conservative surface-area method is often applied reflexively.[59]

ISSUES ARISING FROM HUMAN EXPOSURE ESTIMATES

In addition to developing estimates of the dose-response function, agencies must estimate the likely level of human exposure. This section examines some of the issues and problems that arise in conducting an exposure assessment.

It is a generally accepted principle of exposure assessment that estimates should be based on the most likely scenarios, with appropriate consideration of uncertainty.[60] Nevertheless, agencies often use conservative assumptions for exposure when real-world data are unavailable. When each of these assumptions tends to overstate likely human risks, the multiplicative effect of even a small overstatement at each stage in an exposure assessment will yield a substantial overestimate of exposure. Thus, for example, the multiplicative effect of overstating risk by a factor of two at five different points in an exposure assessment will overstate risks by a factor of thirty-two.

Worst-Case Environmental Conditions

When data are available they often relate to unusually sensitive environments or highly contaminated conditions. When estimating regional or nationwide exposures, agencies often use data from these local "hot spots" in developing more general national estimates of health risks. However, such data are never representative and estimates extapolated from them are generally unreliable and misleading.

In addition, chemicals often degrade naturally after they have been released to the environment. In some cases, degradation occurs very quickly, whereas in others the process may take many years or even decades. A common practice in exposure assessment modeling is to assume that exposures remain constant over time—that is, chemicals are assumed never to degrade, or degradation by-products are assumed to pose identical risks.

The Maximum-Exposed Individual

In addition to estimating the amount of a substance that may actually be present in the environment, a risk analysis must also consider the conditions under which humans may be exposed. Actual risks vary considerably depending on location, mobility, and a host of other factors. Nevertheless, estimates often are based on the upper-bound lifetime cancer risk to the maximum-exposed individual (MEI), the hypothetical person whose exposure is greater than all others'. Sometimes, risks to the entire population are estimated by assuming that everyone is exposed at the MEI level. Because environmental regulations are often justified using

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[56] *Dioxin Risk Assessment Appendix A*, p. 13. Unbiased risk estimates vary by a similar factor.

[57] *Dioxin Risk Assessment* pp. 46–49. 10^{-6} risk-specific doses (RsDs) derived from the linearized multistage model span the range from 0.001 to 1.2 picogram/kg/day. The RsDs of EPA, CDC, and FDA are 0.006, 0.03, and 0.06 pg/kg/day, respectively.

[58] *Dioxin Risk Assessment*, p. 4.

[59] *EPA Carcinogen Assessment Guidelines*, p. 33998. "EPA will continue to use this [surface area] scaling factor unless data on a specific agent suggest that a different scaling factor is justified."

[60] EPA guidance documents consistently call for unbiased estimates of exposure. *See*, e.g., U.S. Environmental Protection Agency, "Guidelines for Exposure Assessment," 50 FR 34042–34054 (September 24, 1986) (hereinafter, *EPA Exposure Assessment Guidelines*); U.S. Environmental Protection Agency, *Superfund Public Health Evaluation Manual*, OSWER Directive 9285.4–1, October 1986; and U.S. Environmental Protection Agency, *Superfund Exposure Assessment Manual* (Revised Draft), OSWER Directive 9285.5–1, December 1986.

MEI-based risk assessments, actual risks may be substantially lower than the risks perceived by decisionmakers and the general public.

In developing the MEI risk level, analyses also typically assume that the level of exposure is continuous over a 70-year lifetime. This assumption overstates actual risks because people are mobile and encounter a constantly changing portfolio of daily risks to life and health.

Assumptions vs. Real-World Exposure Data

The thread that connects these exposure assessment issues is that simple constructs which overstate exposure are typically used in lieu of real-world data, because such data are unavailable. The risk estimates generated by th[illegible]s depend on the validity of their assumptio[illegible]ven small biases in exposure assessment assumptions can result in a substantial overstatement of risk.

For example, regulatory agencies may not have statistically reliable real-world data on pesticide residues in agricultural products. They also may not know the proportion of a given crop that has been treated with a particular pesticide. A common resolution of these uncertainties is to assume that residues are equal to the regulatory "tolerance"—the maximum level allowed to be present in food sold in interstate commerce—and that 100 percent of the relevant crop has been treated. Both assumptions overstate actual exposure, but are encouraged by agency guidance as a way to instill conservatism in risk assessment.[61] When data are available, however, the extent of this conservative bias becomes evident. In a recent pesticide review for Captan, for example, EPA reduced its earlier upper-bound lifetime cancer risk estimate by two orders of magnitude when it replaced the original conservative assumptions with real-world data. Even with these improvements, EPA still reported that upper-bound risks were probably overstated. For example, field tests were performed based on applications at the maximum legal rate and as close to harvest as the label permits. Similarly, feeding studies assumed that animal diets were dominated by feedstuffs that happened to contain high residues relative to other feedstuffs, such as almond hulls and raisin waste. As EPA noted, even if these assumptions accurately represented typical animal diets, they would do so only for portions of California where these crops are grown; nationwide extrapolations based on these "hot-spots" would very likely overstate exposure.[62] Since two of the highest product-specific risks were attributed to milk and meat, these remaining conservative biases can be expected to be significant.

IMPLICATIONS OF CONSERVATIVE RISK ASSESSMENT FOR RISK MANAGEMENT AND REGULATORY DECISIONMAKING

The primary purpose of risk assessment is to provide data as a basis for risk management decisions. Providing useful data requires the synthesis of information concerning risks and exposure levels into a coherent package that can be used to develop regulatory options. Decisionmakers then can use these risk estimates in evaluating regulatory alternatives. Unfortunately, the way in which risk information is characterized tends to overstate risks, making them appear much greater than they are likely to be. As a result, decisionmakers may make regulatory choices that are very different from the ones they would make if they were fully informed.

Quantification of Uncertainty

In accordance with the recommendations of the National Academy of Sciences, the *OSTP Guidelines* explicitly call for the quantification of uncertainty, particularly as it arises in the selection of dose-response models and exposure assumptions.[63] Unfortunately, Federal regulatory proposals that utilize risk assessment rarely provide this information, nor do they analyze the implications of uncertainty for decisionmaking. Instead, many risk assessments only identify a lifetime upper-bound level of risk.[64]

The differences between upper-bound and expected-value estimates may be considerable. As we indicated earlier, upper-bound risk estimates for dioxin are about 5,000 times greater than the most likely estimate. The upper-bound risk estimate for perchloroethylene (the primary solvent used in dry cleaning) exceeds the expected value estimate by a factor of about 35,000.[65]

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[61] *EPA Exposure Assessment Guidelines*, p. 34053. "When there is uncertainty in the scientific facts, it is Agency policy to err on the side of public safety."

[62] *See, e.g.*, U.S. Environmental Protection Agency, "Captan: Intent to Cancel Registrations; Conclusion of Special Review," 54 FR 8127–8128 (February 24, 1989).

[63] *OSTP Guidelines*, (Guideline 27), p. 10378.

[64] *See, e.g., EPA Carcinogen Risk Assessment Guidelines*, p. 33998.

[65] Nichols and Zeckhauser, (*op. cit.*), p. 18.

In many instances, decisionmakers are not informed that risk estimates differ because of policy choices hidden in the risk-assessment methodology. In EPA's draft proposed rule limiting emissions from coke ovens, for example, cancer risks were estimated based on the LMS model—a model that is designed to yield upper-bound estimates of risk. In previous rules involving similar types of risks, however, EPA used the unbiased maximum likelihood estimate. To the extent that decisionmakers were not informed that the higher estimate of risk was due largely to a different low-dose extrapolation procedure, regulatory decisions based on this risk assessment were likely to reflect misunderstanding rather than science.

Misordered Priorities, Perverse Outcomes

Logically, one would expect that the routine overstatement of likely risks would lead to inefficient regulatory choices. Decisionmakers, convinced that a certain substance or activity poses a significant threat to public health, might well take actions that they would otherwise resist. Alternatively, they might take actions that address the wrong real-life risks.

To the extent that risk assessments differ in the degree to which they adopt conservative assumptions, it is difficult to determine which activities pose the greatest risks and hard to establish reasonable priorities for regulatory action. Because conservatism in risk assessment is especially severe with respect to carcinogens, it is reasonable to expect that other health and safety risks tend to receive relatively less attention and weight. As a result, society may actually incur greater total risk, because of misordered priorities caused by conservative biases in cancer risk assessment.

A perverse and unfortunate outcome of using upper-bound estimates based on compounded conservative assumptions is that the practice may actually increase risk, even in situations where cancer is the only concern. Regulatory actions taken to address what are in fact insignificant threats may implicitly tolerate or ignore better known, documented risks that are far more serious. For example, before it was banned, ethylene dibromide (EDB) was used as a grain and soil fumigant to combat vermin and molds. Vermin transmit disease, and molds harbor the natural and potent carcinogen aflatoxin B. It is reasonable to assume that banning EDB probably increased these human health risks. The human cancer risk from the aflatoxin contained in one peanut butter sandwich is about 75 times greater than a full day's dietary risk from EDB exposure. On this basis alone, it might have been appropriate to accept a small increase in cancer risk from EDB to reduce the much larger cancer risk from aflatoxin. By eliminating the relatively small hazard from EDB, Federal risk managers may have intensified the relatively potent threat of aflatoxin associated with an increase in the prevalence of mold contamination.[66]

The emphasis on risks faced by the maximum-exposed individual may also cause a perverse result by increasing overall population risks. For example, EPA's proposed regulation of the disposal of sewage sludge would probably create more public health risk than it eliminates.[67] The proposal outlines a regulatory scheme that would shift disposal from generally safe practices to relatively risky alternatives. Thus, setting sludge quality standards to achieve an MEI upper-bound lifetime cancer risk of one in 100,000 (10^{-5}) would prevent 0.2 statistical cancer cases resulting from monofilling and land application. However, it would cause 2.0 additional statistical cancers by forcing a shift away from these disposal approaches toward incineration.

These problems can be addressed by providing decisionmakers with the full range of information on the risks of a substance or an activity. Thus, decisionmakers should be given the likely risks as well as estimates of uncertainty and the outer ranges of the potential risk. Then, if regulatory decisionmakers want to choose a very cautious risk management strategy, they can do so and a margin of safety can be applied explicitly in the final decision. This approach is superior to one in which the expected risk and an unknown margin of safety are hidden behind the veil of a succession of upper-bound estimates adopted at key points in the risk assessment process.

The public and affected parties also benefit from knowing both the expected risk and the margin of safety rather than being given upper-bound estimates that are probably very different from actual risks. People are likely to have a better intuitive understanding of the significance of averages than they have of unlikely extremes. To the extent that a margin of safety is appropriate—perhaps to protect unusually sensitive subpopulations—the magnitude of this margin can be more readily communicated if made explicit. In addition, providing information in this way should help improve public confidence in quantitative risk assessment as the basis for decisionmaking.

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[66] Ames et al., (op. cit.), p. 273.

[67] U.S. Environmental Protection Agency, "Standards for the Disposal of Sewage Sludge; Proposed Rule," 54 FR 5746–5902, (February 6, 1989).

AVOIDING CONSERVATIVE BIASES IN RISK ASSESSMENT

Risk assessment remains a powerful and useful scientific tool for estimating many of the risks that arise in a technologically advanced society. Unfortunately, it is also susceptible to hidden biases that may undermine its scientific integrity and the basis for policymakers' reliance on such information in risk management decisions. For policymakers and the public to continue to rely on risk assessment in the development of regulatory initiatives, a renewed effort must be made to separate science from policy and provide risk information that is both meaningful and reliable.

Expected Value Estimates

Perhaps the most important current need in regulatory decisionmaking is for carefully prepared and scientifically credible estimates of the likely risks involved. Relying on worst-case analysis based on extremely conservative risk assessment and exposure models leads to widespread misunderstanding on the part of both Government officials and individual citizens. Decisionmakers at all levels need unbiased and impartial risk information so they can focus their attention on significant problems and avoid being distracted by minutiae.

Weight-of-Evidence Determinations

Similar procedures are needed for assigning weights to each relevant study in the risk assessment literature. Current procedures give undue weight to studies that show positive relationships. Resulting risk classifications are thus conservatively biased estimates derived from samples of similarly biased observations.

Full Disclosure

Efficient and responsible decisionmaking requires that policymakers and the public be fully informed about the implications of the regulatory alternatives among which they must choose. Meeting this requirement demands a careful discrimination between science and policy. When risk estimates depend on assumptions and judgments instead of data, the meaning and implications of these nonscientific parameters must be clearly articulated.

Avoiding Perverse Outcomes

Careful attention needs to be paid to the likely results of regulatory alternatives, with an eye toward avoiding choices that have the perverse effect of increasing net risk. All human activity involves risk. Decisionmakers need to be sure that specific actions taken in the name of risk-reduction in one area do not make matters worse elsewhere. Quantitative risk assessment can help in this regard so long as the methods applied are not inherently biased in a way that undermines comparisons across alternatives, each of which entails some degree of risk.

Our discussion has covered only the highlights of risk assessment methods, yet we have identified several independent places at which conservative assumptions are commonly used. Individually, each of these assumptions might appear to be prudent responses to scientific uncertainty. In combination, however, they result in a distortion equal to the product of the individual conservative biases. To illustrate, suppose that there are ten independent steps in a risk assessment and prudence dictates assumptions that in each instance result in risk estimates two times the expected value. Such a process would yield a summary risk estimate that is more than 1,000 times higher than the most likely risk estimate. Because there are usually many more than ten steps, and many of them will incorporate conservative biases that exceed an order of magnitude, published risk estimates will often exceed the most likely value by a factor of one million or more.

When risk assessments contain hidden value judgments, their scientific credibility is inevitably compromised. To the extent that policymakers and the public fail to understand the magnitude of the margin of safety embedded in quantitative risk assessments, policy choices may be distorted from the course that would have been selected had they been better informed of the actual risks. Ironically, these policy decisions may actually increase total societal risk. Too much attention may be focused on relatively small hazards that have been exaggerated by conservative risk assessments, leaving alone larger risks that have been estimated using unbiased procedures.[60]

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[60] Nichols and Zeckhauser, (op. cit.).

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WORKSHOP PROGRAMME

RISK AND REGULATION: FROM ASSESSMENT TO COMMUNICATION
AND
REGULATORY INFORMATION MANAGEMENT

16th, 17th & 18th JANUARY 1990 IN WASHINGTON, D.C., UNITED STATES

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Office of Information and Regulatory Affairs
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IN CO-OPERATION WITH:

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WORKSHOP PROGRAMME

INTRODUCTION

MAJOR THEMES OF WORKSHOP

Risk and Regulation: From Assessment to Communication

1. Regulatory policy choices involving the environment, public health and safety always involve risk. The public is becoming increasingly concerned about risks imposed by the actions of an industrial society. Governments are responding to this concern by instituting regulations meant to contain or reduce risks. By careful examination of emerging risk-ranking issues, decision makers, their advisors, and analysts, will be better equipped to understand public concerns, develop the necessary information to evaluate regulatory alternatives, and make more systematic and cost effective policy decisions when developing and evaluating risk-based regulation.

2. The workshop sessions on this topic will draw chiefly upon the considerable United States experience in applying risk assessment and risk communication to complex and controversial regulatory management issues. The sessions devoted to risk and regulation are designed to provide attendees with an understanding of how risk assessment can be brought to bear upon regulatory problems and to enable the attendees to clearly communicate how the results can be incorporated into political decision making and regulatory management processes.

Regulatory Information Management

3. Government officials, who conduct regulatory research, drafting, review and tracking, and the regulated community require rapid access to up-to-date legislative and regulatory information. What information is needed? How can it be collected, maintained and retrieved? What is being done? What databases already exist? Are there automated systems to aid in regulatory development? A survey of current applications and anticipated innovations will be presented and practical solutions for Member country needs will be explored.

4. Participants will be able to take advantage of the expertise of the United States Government's Regulatory Information Service Center, which is the organisation responsible for providing information about regulatory activity to the President and his Executive Office, the Congress, agency managers, and the public.

PARTICIPATION

5. The approach is geared for generalists in regulation and legislation development, review and reform. In addition, however, the programme could be useful to technical specialists, and their participation is also welcome.

OBJECTIVES

6. This workshop has been organised to enable participants to explore "state-of-the-art" knowledge and Member country experience in risk communication, management and assessment and regulatory information management.

a. Specific objectives for the workshop sessions on Risk and Regulation are to:

- -- Review the concepts and practices of risk assessment, risk management and risk communication which are increasingly being applied to rule-making in OECD Member countries;
- -- Examine the advantages and disadvantages of applying risk-based methods to regulatory decision-making;
- -- Determine how risk assessment can be used to evaluate regulatory burdens on individuals, firms, populations, etc., and to help in the setting of regulatory priorities;
- -- Evaluate the resources that may be required, by regulatory management organisations, to respond to new demands created by the use of risk-based approaches in other organisations with which they interact (e.g., Ministries, Agencies, Industry and Academia).

b. Specific objectives of the workshop sessions on Regulatory Information Management are to:

- -- Explore organisational and technological solutions for the management of regulatory information;
- -- Demonstrate in practical terms how the U.S. system operates;
- -- Discuss needs and problems concerning international access of regulatory information;
- -- Consider how systems for the management of regulatory information could be improved in the future.

WORKSHOP LOCATION AND SCHEDULE

7. The workshop will be held at:

The Conference Rooms of the United States Department of State
2201 C Street, N.W. [Main Entrance]
Washington, D.C., United States

8. The workshop will be held on the 16th, 17th & 18th of January 1990. It will consist of six half-day sessions as indicated in the Programme attached. Workshop registration is at 8:30 and the workshop will begin at 9:00 on the first day and is expected to adjourn at approximately 17:00 on the last day.

ADDITIONAL INFORMATION

9. Detailed information about methods of work, participation, working languages, documentation, and outputs and logistics can be found in the Appendix to the Programme.

WORKSHOP PROGRAMME

RISK AND REGULATION: FROM ASSESSMENT TO COMMUNICATION
AND
REGULATORY INFORMATION MANAGEMENT

16th, 17th & 18th JANUARY 1990 IN WASHINGTON, D.C., UNITED STATES

CHAIRMAN

Jay Plager, Administrator, Office of Information and Regulatory Affairs,
Office of Management and Budget, Executive Office of the President

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DAY 1. Tuesday, 16th January 1990

8:30 Registration

9:00 Introduction and Welcome by the Chairman, Jay Plager

THEME I. RISK AND REGULATION

Day 1, Session A. **Overview**

9:15 - 10:40

Policy choices involving the environment, public health, and safety always involve risk. Sometimes, these risks can be prevented through the expenditure of public funds or the promulgation of regulations. In many cases, however, a decision to avert one set of risks inevitably implies tolerating or even stimulating other risks.

This introductory session establishes some common terminology, presents the theme of the workshop, and raises questions that the workshop is designed to answer. What is risk assessment? How is it different from risk management? In what ways can policy makers take the lead in risk communication? Why must policy makers and senior civil servants understand the rudiments of these topics? How can they be applied in the context of regulatory review?

* * *

To set the discussions in the several workshop sessions in a practical context, several broad applications will be considered. Among the case studies to be treated are:

Public Health (e.g. AIDS)
International Air Travel Safety (e.g. terrorism)
Food Safety (e.g. fish and seafood)
Environmental Carcinogens (e.g. pesticides)

Each of these problems is complex, not amenable to easy answers, and likely to be the subject of extensive regulation in the near future. Background material on each of these applications will be provided to lay the foundation for subsequent workshops to build upon. Because the workshop is not intended to be a conference on any of these specific topics, participants need not have a scientific or technical background to benefit from the applied discussions.

BREAK

10:40 - 11:05

Day 1, Session B. A Taxonomy of Policy Issues Involving Risk

11:05 - 12:30

The public reacts to risk in a variety of ways that range from nonchalance to abject horror. This session explores human response to risk. Then it examines different types of policy decisions involving risk and how human responses to risk affect such decisions. The product of this exercise is a taxonomy of policy decisions involving risk. By careful classification of emerging risk-related policy issues, decision makers will be better equipped to understand public concerns, develop the necessary information to evaluate regulatory alternatives, and make more systematic policy decisions.

LUNCH

12:30 - 14:00

Day 1. Session C. Fundamentals of Risk Communication

14:00 - 15:30

Risks can be characterised in many different ways, some of which have special meaning and significance to policy makers and the general public. This session explores a variety of ways in which risks may be represented to achieve particular objectives. The important elements of risk communication consist of magnitude, extent, and variation across members of the population. Because all estimates of risk suffer from uncertainty, the methods used to convey uncertainty are also important.

BREAK

15:15 - 15:40

Day 1. Session D. Communicating with the Press and the Public

15:40 - 17:00

Once policy makers understand the risk attributes of a policy issue and are prepared to make decisions, the difficult task of communicating these complex matters remains. This may entail the development of a strategy for dealing with the press, the public, and special interest groups that have an unusually large stake in the policy decision. This session will explore different ways in which risk communication strategies have been crafted, consider whether they have succeeded or failed, and determine what lessons might be drawn from previous experience.

RECEPTION

DAY 2. Wednesday, 17th January 1990

THEME II. RISK MANAGEMENT AND ASSESSMENT

Day 2. Session A. Criteria for Risk Management Decision Making

9:00 - 10:15

What makes one risk "acceptable" but another one abhorrent? This question has troubled risk analysts and decision makers for years. This session summarizes recent research aimed at providing workable answers to the question. Using the illustrative case studies, a range of possible explanatory factors will be considered.

The session also will examine several approaches that have been suggested for policy makers to follow as they wrestle with risk management choices. These approaches include setting upper and lower threshold risk levels; examining risks relative to others ("comparative risk"); weighing individual against population risks; and analyzing whether eliminating one set of risks may exacerbate another ("net risk"). The case studies provide an excellent vehicle for illuminating how these different risk management approaches operate in practice.

BREAK

10:15 - 10:45

Day 2, Session B. Incorporating Risk Assessment in Regulatory Review

10:45 - 12:00

An effective regulatory review programme will encounter risk-related issues with increasing frequency in the coming years. Thus, government officials charged with regulatory review cannot escape dealing with risk assessments.

This session offers two generic methodologies for incorporating risk assessments and risk management decision making criteria into a regulatory review programme. The first is internationally known as decision analysis, and it can be briefly described as a mechanism for choosing among a range of competing alternative solutions, each of which suffers from uncertainty concerning what in fact will occur. In addition, uncertainty as to the degree of public compliance which can be attained may also weigh heavily in the decision making framework.

The second methodology is benefit-cost analysis, a somewhat different use of a similar general decision making strategy. Benefits often consist of reductions in risk; hence, understanding the likely extent to which risk may be reduced through a particular regulatory action is a crucial element of this analytic method. Possible compliance problems may also be important, especially in the comparison of regulatory alternatives, and may be incorporated into the analysis. Design standards, performance standards, information disclosure, and market-based incentives will be considered in this context.

LUNCH

12:00 - 13:30

Day 2, Session C.   Risk Assessment: Principles and Problems

13:30 - 15:00

The methods used to assess risks depend on their nature. Human cancer risks, for example, typically are estimated using a mixture of epidemiology and laboratory animal testing. In contrast, fault trees and other engineering-based approaches are often used to estimate risks of complex technological systems, especially when failures are expected and intended to be rare. Accident and surveillance data may be especially helpful for analyzing recurring events. Each approach to risk assessment has both advantages and disadvantages; often, the regulatory context affects the choice of risk assessment methodology. This session discusses the various means used to assess risks.

Risk assessments usually distinguish between hazard and exposure. Hazard assessments generally encompass risks that are intrinsic to a product, process, or activity. Exposure assessments, as the term suggests, measure the extent to which human populations (or sub-populations) are prone to suffer a particular hazard. Both hazard and exposure assessments have probabilistic attributes; risk assessments derived from them reflect their individual uncertainties. With respect to the examples, the processes used to derive both hazard and exposure estimates will be discussed.

Risk estimates can be expressed many different ways, depending upon the needs of policy makers. Some have special statistical properties; others only resemble statistically valid expressions. Like other concepts with precise meanings, risk estimates can be readily misinterpreted and misused. Examples will be drawn from the case studies to illustrate equivalent as well as misleading characterizations of the same objective risk.

From this exercise it will become apparent that science and policy judgement often overlap. This session will conclude with a discussion of certain problems reflected in contemporary risk assessment practices. A check list of questions that should be addressed before using risk assessments to guide public policy decisions will be put forward for discussion.

BREAK

15:00 - 15:20

Day 2. Session D. **The Question of Resources**

15:20 - 16:15

This session will consider the resources that may be required by regulatory management organisations to respond to new demands created by the use of risk-based approaches in their own organisations or in others (Ministries, Agencies, Industry, Academia, etc.) with which they interact.

Day 2. Session E. **Wrap-Up: Integrating Risk Assessment, Management, and Communication**

16:15 - 17:15

The concluding session on risk assessment will address how risk assessments may be incorporated in risk management and regulatory decision making processes. How the lessons learned concerning risk communication can be applied to regulatory and risk management processes will be discussed.

Day 3. Thursday, 18th January 1990

THEME III. Management of Regulatory Information

Day 3. Session A. **Introduction:**

9:00 - 10:45

Governments must have information in order to operate effectively. Information, ranging from anecdotal to empirical, is the basis for all government decisions and is an especially important component in the legislative and regulatory processes. Governments need to maximize the automated information tools they have available in order to understand, to the extent practicable, both the bases for and the consequences of their legislative and regulatory actions before they take those actions.

This introductory session will look at various areas of the legislative and regulatory development and review processes of OECD Member nations and identify where information is needed, some of the alternative means of collecting it, and, using information contained in the Directory of Regulatory Review and Reform Organisations in OECD Member Countries, discuss what is currently being done in these countries to make automated information available in those processes. Finally, there will be a presentation describing how the United States uses automated information in its processes.

BREAK

10:45 - 11:15

Day 3. Session B. Looking Ahead: What could be Done in the Future

11:15 am - 13:00

Governments today are at a relatively early stage in the development of computerization as a tool in the legislative and regulatory processes. After developing some fundamental skills, such as the ability for full text search and retrieval of the existing base of legislation and regulation and automated tracking of the issuance and review processes, nations could begin to devote their attention to more advanced uses of automation. With the approach of 1992, the need for and usefulness of such systems will increase dramatically.

For example, multinational data bases containing the legislation and regulations of neighboring nations of trading partners could be developed to identify areas of duplications, overlaps or possible inconsistences in their regulatory structures. In addition, a multinational database of innovative (i.e., other than "command and control") regulatory techniques could be developed to assist drafters by providing them access to information providing data on solutions to the same or similar regulatory problems in other countries. Concepts such as/artificial intelligence could be incorporated into the development of such systems to facilitate their use.

LUNCH

Day 3. Session C. Automation Open House

14:30 - 17:00

During this final session, attendees will be invited to attend an "automation open house" where there will be presentations of several government-owned automated information systems that are used in the development and review of legislation and regulation in the United States. Programme and technical experts will be available to answer questions.

APPENDIX TO THE PROGRAMME

ADDITIONAL INFORMATION

BACKGROUND

1. This meeting is the second in a series of technical workshops planned for practitioners of regulatory review and reform management and other officials working in related areas of regulatory and legislative affairs. The first workshop in this series was held in Montreal in October 1988, on the topic of Regulatory Analysis Techniques. It was hosted by the Canadian Office of Privatisation and Regulatory Affairs in co-operation with the OECD and the active participation of Member countries. As a result of that event and the subsequent Plenary Meeting held in Paris in January 1989, Member countries concluded that a series of technical workshops should be conducted on selected topics, reflecting the needs of practitioners.

2. During Spring 1989, a survey was conducted to determine Member country priorities for continued international co-operation in the field of regulatory review and reform management. The selection of workshop topics is based upon country responses to the survey and other direct indications of interest to the Secretariat.

METHOD OF WORK

3. Workshop sessions will involve a combination of expert presentations and panel discussons. Examples and case studies will illustrate concepts and practices. Discussion and questions from participants will be welcome. The workshop sessions are designed to promote a frank, informal and confidential exchange of information. Participants need not have a technical background to benefit from presentations and discussions.

WORKING LANGUAGES

4. The working languages will be English and French, with simultaneous interpretation provided.

DOCUMENTATION

5. Background documentation will be available at the workshop.

OUTPUT

6. A workshop report will be drafted and circulated for review and comment. Ultimately, the intent of the Secretariat is to incorporate the results of the workshop into a document concerning regulatory assessment practices.

LOGISTICS

Airports:	Washington, D.C. is served by Dulles Airport and National Airport. There is metro and taxi and limited bus service into Washington, D.C. from National Airport. Dulles is served by taxi and limited bus service.
In-town transportation:	Taxis and metro are available and convenient. Bus service is also available.
Hotel:	Participants are requested to make hotel arrangements.

WORKSHOP ON RISK AND REGULATION: FROM ASSESSMENT TO COMMUNICATION
AND
REGULATORY INFORMATION MANAGEMENT

16th, 17th & 18th January 1990
Washington, D.C., United States

MEETING PARTICIPATION REPLY FORM

To be completed for each participant

The information will be used as a basis for the Participants List, and for all correspondence. Please return the completed form to the Secretariat on or before 30th November 1989:

Public Management Service
Organisation for Economic Co-operation and Development
2, rue André-Pascal
75775 Paris Cedex 16
FRANCE

Attention of Marilyn Cohen-Yakowitz

Telefax: Area Code (33-1) Number (45 24 78 52)
Telephone: Area Code (33-1) Number (45 24 89 91) or (45 24 90 68)

SURNAME: ______

FIRST NAME: ______

TITLE: ______

WORK ADDRESS:

Department: ______

Organisation: ______

______

Number and Name of Street: ______
(or P.O. Box Number)

______

City: ______

Country: ______

Postal Code: ______

Telefax: Area Code ( ) Number ( )
Telephone: Area Code ( ) Number ( )

The two official languages of the OECD are English and French. Please indicate below the language in which you would prefer to receive correspondence and documentation:

English ______

or

French ______

W4064T

Statement of Professor Cass R. Sunstein
Karl N. Llewellyn Professor of Jurisprudence
University of Chicago Law School

Before the Committee on Governmental Affairs
United States Senate

February 21, 1990

Statement of Professor Cass R. Sunstein, University of Chicago Law School

Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to speak before you today on issues of law and legal policy associated with certain aspects of S. 1742, designed to promote the goal of coordinated information management within the federal government. I have been asked to speak to the questions raised by section 112 of the bill and will therefore make no comment on the other provisions, which deal primarily with information resources management.

At least in terms of actual enactments, Congress has not yet recognized and responded to the enormous changes in the administrative process that have been brought about by Office of Management and Budget (OMB) coordination of the regulatory process -- probably the most important development in administrative law in the last decade. In general, I believe that section 112 is sound and that it would move the process of regulatory administration in appropriate directions. In particular, my conclusions are as follows.

1. It is appropriate to recognize and endorse the power of the Office of Information and Regulatory Affairs (OIRA) of OMB to coordinate and oversee the regulatory process.

2. It is desirable, and unquestionably lawful, for Congress to constrain that on balance highly salutary process -- which has

seen some abuses -- by imposing deadlines and by creating a requirement of a public file containing information received by OIRA from people outside of government.

3. A statute fulfilling the purposes of section 112 is preferable to informal arrangements, because of its permanence and the greater likelihood of compliance.

4. Congress probably has the power to require disclosure to the public of the times and dates of meetings between OIRA and the agencies; material of this sort would not interfere with the deliberative process.

5. Congress probably has the power to require disclosure to the public of all _facts_ on which rules are based, including facts introduced by OIRA.

6. Section 112 does raise serious questions of constitutional law and public policy insofar as part of it would require disclosure, to the public and to the Congress, of communications that are part of the internal deliberative processes of the executive branch. Probably the best guess is that this provision would be upheld in full by the Supreme Court. But the prediction is uncertain; a presidential veto is highly likely; and both Congress and independent observers should have serious doubts about the constitutionality of this aspect of the bill. There are, in short, legitimate problems here.

With respect to point (6), it is important to note that there is no clear precedent for this broad requirement. The Freedom of Information Act exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Under current interpretations, this exemption would bar disclosure of information relating to communications between OIRA and the agencies. See Wolfe v. Department of HHS, 839 F.2d 768 (D.C. Cir. 1988). Because (a) OMB is already and of its own accord making the relevant information available, (b) a requirement of publicity could in some circumstances impose an unreasonable chilling effect on communications within the executive branch, and (c) this part of the bill, as written, raises legitimate constitutional doubts, I believe that it should be deleted or, better, rewritten in ways that would accomplish almost all of the goals of section 112 without producing the current difficulties. I make some suggestions along these lines below.

I. In General

To the extent that section 112 is founded on the idea that the President, through OIRA, may supervise and guide the regulatory process, it reflects central constitutional commitments. Above all, Article II of the Constitution embodies a decision to create a unitary rather than plural executive. This decision was founded on three underlying goals.

The first was to ensure a distinctive form of accountability in government. A unitary executive, headed by a single person, would be especially likely to be responsive to the electorate for failures in the executive branch. The second goal was to ensure expedition and energy in the execution of the laws. A system in which diverse entities were entrusted with executive authority would be likely to be weak and divided; the unitary executive would provide a sharp contrast. Third, and finally, the unitary executive would ensure coordination and centralization in government. The Supreme Court endorsed these fundamental points in Myers v. United States, 272 U.S. 52 (1926).[1]

These concerns are not merely of historical interest. They have assumed more rather than less weight in the circumstances of modern government. The massive and unanticipated proliferation of regulatory agencies at the national level, with broad and diverse powers, has made it all the more important to ensure that the President is in a position to oversee and coordinate their decisions. Indeed, the absence of coordination in government has been an important barrier to sensible regulation in many contexts. See, e.g., Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451 (1979); see also Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 452-454, and sources cited therein (1987). And if the President has the power of coordination, it is inevitable, under modern conditions, that he will delegate a large degree of that power and not exercise it personally. Hence the exercise of the power of coordination by OIRA is fully consistent with the constitutional plan, translated into current circumstances.

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[1] Supreme Court decisions recognizing legislative power to create "independent" entities do require qualification of the general "unitary executive" view, but since we are speaking for present purposes of agencies agreed to be "within" the executive branch, those cases are for those purposes irrelevant. See Humphrey's Executor v. United States, 295 U.S. 602 (1935); Morrison v. Olson, -- U.S. -- (1988). The goals underlying the unitary executive would, however, fully support extension of OIRA's power to the independent regulatory agencies.

This power does not operate to limit in any way the authority of Congress. The national legislature has the most important power -- to enact the law -- and any presidential oversight must be subordinate to this power. All this suggests that insofar as section 112 represents the first explicit congressional endorsement of OIRA supervision, it is supported by central constitutional commitments.

To say this is not of course to deny the possibility that OIRA may abuse its authority in practice. Indeed, there have been many serious allegations of such abuses -- in the form of delays, violations of substantive law, usurpation of the agency's ultimate power of decision, and an undue antiregulatory bias operating on occasion to the detriment of the public at large. See, e.g., Hearings before the Subcommittee on Government Information and Regulation, Committee on Government Affairs, United States Senate, 101st Cong., 1st Sess. (June 16, 1989). The original Executive Order 12291 grew out of a recognition that over-regulation is in many settings an important national problem and that institutional mechanisms should be create to ensure against it. This remains true today. But in other settings, the problem is under-regulation. It would be highly desirable for OIRA to consider its mission to include not merely the prevention of unjustified controls, but also the initiation of necessary regulatory measures. To this date, this understanding of OIRA's mission, while a natural outgrowth of the coordinating function, appears to have played no role.

In any case, there is no doubt that it is not for the executive branch to refuse to enforce laws because it disagrees with them; nor is there any question that the ultimate power of decision lies with the agency head rather than OIRA. It is important for Congress and the President to ensure against any possible abuses of what is, on balance, a sound development. I now turn to that question.

II. Disclosure, Outside Communications, Delay

Section 112 does not merely recognize OIRA's power of supervision. It also requires the Administrator to establish and maintain a public file for each agency activity and to take steps to ensure public access to communications between OIRA and those outside the government. The materials at issue include, for all agency activity, a list of meetings with people outside the federal government and copies of materials received by and provided to such people. Section 112 includes similar requirements for all rulemaking activities.

There is a great deal to be said in favor of section 112 insofar as it requires communications between OIRA and private persons to be placed in public file. Simply as a matter of policy, communications[2] between private persons and agencies themselves should ordinarily be made available to the public. As a matter of current law, however, it is unclear whether or not there is a requirement to this effect. Under the original understanding of the Administrative Procedure Act (APA), rulemaking was to be "informal," and there was no requirement of a record. See 5 U.S.C. 553.

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[2] Perhaps, however, the requirement should be limited to "substantive" communications, or at least to exclude informal communications that do not involve the introduction of material

Judicial decisions make it uncertain if the APA now requires any sort of "public file" for rulemaking at all. Acting under the provision of the APA that allows courts to invalidate agency action that is "arbitrary, capricious, or an abuse of discretion," 5 U.S.C. 702, many courts have said that the judiciary must have available to it a sufficient record to evaluate whether agency action is lawful. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983). Some courts have indicated that in order to undertake this task, courts and the public must see all substantive communications with private parties. See, e.g., Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977). But the law on these matters remains in a state of considerable uncertainty. See Note, Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience, 55 U. Chi. L. Rev. 591 (1988).

Section 112 would therefore change or at least solidify current law insofar as it would make clear that OIRA must keep a "public file" containing a record of outside communications. If

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arguments of policy or fact. There would, however, be difficulties in administering any such distinction.

an ordinary agency were communicating with private persons, this change or clarification would be highly desirable insofar as it would inform the public and reviewing courts of communications between the government and outside parties. The very fact that the executive branch is unitary argues powerfully in favor of the view that OIRA stands on the same footing as an ordinary agency and should therefore docket its communications with private persons. As noted, there is at least some evidence of past OIRA abuses in this regard. Section 112 would serve as a valuable corrective here. See Olson, The Quiet Shift of Power: OMB Supervision of EPA Rulemaking Under Executive Order 12291, 4 Va. J. Nat. Res. Law 6 (1986).

Moreover, no constitutional issue is raised by a requirement that such communications be made public. (In certain limited circumstances, it is possible that the interest in candid communications will allow the President to assert executive privilege with respect to discussions with people outside government, but that is unlikely to be a serious issue here.) Thus far, then, section 112 stands on solid ground. Indeed, it would be desirable for Congress to amend the Administrative Procedure Act more generally so as to make clear that substantive communications with people outside the government should be made part of a "record" for the public and for judicial review. Many agencies follow this advice in practice. But some do not, and it is highly uncertain whether there is now a legal requirement to this effect.

Section 112 also imposes certain deadlines on OIRA, designed to ensure against delays in the reviewing process. Delays may impede necessary regulation (or deregulation) and indeed produce violations of statutes and court orders. To this extent as well, section 112 moves in precisely the right directions.

III. The Problem of Inter-Executive Branch Communications

Far more difficult issues are raised by section 112 insofar as it would require that communications between OIRA and the relevant agency be placed in the rulemaking file and eventually made available to the public. Here the relevant constitutional policies raise doubts about such a requirement. To offer some analogies: Suppose that Congress required disclosure of communications between federal judges and their law clerks, or indeed between members of Congress and their staffs. Some such measures would raise serious doubts under Articles III and I. For the same basic reason, section 112 raises serious questions under Article II.

A bit of background is in order here. After United States v. Nixon, 418 U.S. 683 (1974), it is clear that Article II of the Constitution implicitly carries with it a power of executive privilege. That power consists of an authority, on the part of the President, to keep secret at least his personal communications with his high-level advisors. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." Id. at 705.

In United States v. Nixon, the Court emphasized that this privilege was not unqualified. "The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises." Id. at 706. In the Court's view, presidential communications are "presumptively privileged," id. at 708, and a court's need for information in order to provide a fair criminal trial could provide a basis for overriding the privilege. Id. at 709. "[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would . . . gravely impair the basic function of the courts." Id. at 712.

Subsequent decisions have followed the same analysis. Thus in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court upheld a statute designed to ensure that President Nixon's presidential materials would be held by the General Services Administration and screened for the preservation of those having historical value. Some of the materials would eventually be made accessible to the public. The Court held that these presidential communications were privileged, but that a requirement of archiving them was permissible. The Court emphasized that there was a screening process including "a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns," id. at 451, that not all materials would be publicly available, and that legitimate public interests -- involving historical purposes, congressional needs for assessing remedial legislation in the wake of Watergate, and "facilitating a full airing of the events leading to" Nixon's resignation -- supported that limited intrusion.

In Nixon v. Freeman, 670 F.2d 346 (D.C. Cir. 1982), moreover, the court of appeals upheld regulations that allowed public access to certain tape recordings. The court noted that the incumbent President did not accept President Nixon's challenge, that the privilege erodes with time, and that the interests at issue in Administrator of General Services were also applicable here. See also Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977), in which the court held that the privilege had been outweighed in a civil action brought by people alleging that they had been unconstitutionally arrested during a demonstration on Capitol Hill.

In the context at hand, United States v. Nixon makes it plausible to suggest that the communications between OIRA and agencies are, at least as a presumption, protected by executive privilege. And unlike in the Nixon case and its successors, there appears at first glance to be no significant particularized interest to overcome the privilege. No interest in a fair trial, for example, is plausibly at stake.

If this conclusion is to be resisted, it must be for one of two reasons.

A. Does the privilege apply to nonpresidential communications? It is possible that executive privilege applies to communications involving the President, but not to other communications within the executive branch, or, in particular, to communications between one subordinate entity (OMB) and another (say, EPA). If executive privilege is seen as "personal" in the sense that it requires presidential involvement in the communication at issue, section 112 is constitutionally unobjectionable.

(1) Precedent. Two cases suggest that this may indeed be the right conclusion. In Nixon v. Administrator of General Services, supra, the Court said that the privilege would apply "at most to the 200,000 items with which the [President] was personally familiar," and indicated that most of the 42 million pages of documents in question in that case would not be privileged. 433 U.S. at 449. It is at least possible to read this statement as embodying a conclusion that the privilege is limited to presidential communications. On the other hand, the comment is a bit cryptic, and the Court was not confronted with the precise question whether executive privilege applied to nonpresidential communications.

More directly on point is the decision in Wolfe v. Department of HHS ("Wolfe I"), 815 F.2d 1527 (D.C. Cir. 1987) -- a decision that is, however, completely without authority because it was vacated and the case resolved on other grounds in Wolfe v. Department of HHS ("Wolfe II"), 839 F.2d 768 (D.C. Cir. 1988)

Despite its lack of authority, the analysis in Wolfe I is the only extended discussion of the application of the privilege to OMB-agency communications. It is therefore entitled to some exploration here.

In Wolfe I, the court of appeals held that there was no constitutional obstacle to an action under the Freedom of Information Act requiring disclosure of a "regulations log" maintained by HHS. The log contained a list of actions proposed by FDA, the date on which the actions were received, and the date on which HHS sent the actions to OMB. The court said that the deliberative process exemption did not apply to the log (it is here that Wolfe II ruled otherwise). The court also said that executive privilege would not apply, first, because the information in the logs contained only the titles and dates of transmittal of proposed regulations, and therefore disclosure would not threaten the deliberative process. According to the court, this material was not clearly deliberative.

More fundamentally, however, the court said that "extension of the presidential privilege to the OMB is unprecendented and unwarranted. The President himself and any communications with him are not implicated in any way by the OMB review process; to extend the privilege to OMB invites extension to the entire Executive Branch, which would create an unnecessary sequestering of massive quantities of information from the public eye." Id. at 1533. Judge Bork dissented, arguing that this conclusion is "troubling . . . because it ignores the President's need . . . to delegate his duties." Id. at 1539. When there has been a delegation from the President, Judge Bork said that exective privilege might apply. See also Sierra Club v. Costle, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (suggesting that communications between the President and EPA officials need not be disclosed, but that disclosure "may" be necessary where Congress has said so explicitly).

The discussion in Wolfe I should be approached very cautiously indeed. In Wolfe II, a divided court of appeals, having vacated Wolfe I held that the deliberative process exemption did bar disclosure, and therefore the court did not reach the constitutional issue. (Wolfe II therefore does not cast any doubts on section 112.) Moreover, the treatment of that issue in Wolfe I is only dicta. The case turned in large part on the narrow conclusion that the deliberative process was not endangered. But if the entire analysis in Wolfe I were to be followed, no privilege applies at all in this area. Indeed, even if the privilege is available, it would be unlikely to be an obstacle to section 112 insofar as that section requires disclosures that do not go to the details of the deliberative process. See section 3518 (a) (3) (information about the date of submission and the name of the agency and so forth). Different questions would be raised insofar as section 112 requires disclosure of changes made as a result of OIRA recommendations or of draft rules and OIRA comments thereon. Here the deliberative process is more directly implicated.

(2) Principle. The Supreme Court has not ruled on the question whether executive privilege attaches to communications

not involving the President. Some considerations would argue in that direction. There is less of a historical record in favor of executive branch withholding of communications in which the President is not involved. Perhaps the President needs unimpeded communications because of his high visibility and responsibility, and his consequent special need for tentative give-and-take. Moreover, the Court has distinguished between the President and other executive branch officials in a related context. See Harlow v. Fitzgerald, 457 U.S. 800 (1982) (concluding that President has absolute immunity from damages and that his assistants have qualified immunity).

Despite these considerations, it would be somewhat surprising if the Court were to hold that executive privilege is totally inapplicable to lower level officials within the executive branch. Imagine, for example, a discussion between White House staff and the Secretary of State about foreign policy, or of Cabinet heads at a high level meeting. Could it be seriously urged that Congress could all such discussions to be made public merely because the President was not in attendance? If the answer is negative, it will not be easy to distinguish discussions between OIRA and the agencies.

Moreover, under the original constitutional plan, see supra, and Myers v. United States, 272 U.S. 52 (1926), the executive branch is unitary. This means that subordinate officials within the executive branch are exercising the president's power, not their own. So far as the law is concerned, they are a part of him. If this is so, it follows that their communications are, so far as the Constitution is concerned, his as well. If he wants to keep those communications secret, he may well be entitled to do so. The context of damages, see Harlow, supra, is different because the unitary executive principle is not so clearly involved. Moreover, there is no historical evidence of Congress requiring disclosure of internal deliberative processes of the executive branch.

Perhaps the Court would conclude that Congress may require disclosure of executive branch communications not involving the President upon a lesser showing of need; perhaps, following Wolfe, it would say that the privilege is limited to the President. But in principle, it is hard to understand why the privilege should not attach to communications between the White House and executive branch agencies.

B. Even if the privilege attaches, has it been overcome in this context? The second argument would be that even if a generalized privilege applies to communications between OIRA and the agencies, that interest is overcome in this context, just as it was in Nixon itself.

We might illustrate this point with an example. If Congress had reason to believe that OIRA had in a particular case introduced unlawful factors into a rulemaking proceeding, in all likelihood Congress, like a district court in a criminal trial, could overcome the privilege as part of its ongoing investigation of executive branch conduct. That is: A particularized legislative reason for fear of illegality, and a desire to ferret it out during an investigation, should overcome the privilege, just as a particularized judicial need does so in the context of a trial. It is this principle that supports the widely-accepted idea that a legislative subpoena to the executive branch is something with which the President must generally comply.

In the setting at hand, perhaps it could be argued that Congress has in fact found a substantial need for disclosure in order to ensure against abuses of the regulatory process by OIRA. As noted, some such abuses have been alleged in the past, and there is some reason to fear that OIRA has engaged in illegality in usurping the delegated power of administrative agencies and in violating the substance of regulatory statutes because of its excessive antiregulatory bias. See Olson, supra; Hearings Before the Committee on Governmental Affairs, United States Senate, 100th Cong., 2d Sess. (October 3, 1988). Perhaps Congress' desire to eliminate these problems would support a decision to overcome the privilege in precisely the way that section 112 promises to do.

As a general argument for disclosure of all communications between OIRA and executive agencies, however, this argument should probably fail. It is one thing to say that upon a particularized showing that there was reason to believe that OIRA involvement has given rise to illegality, the privilege is overcome. It is quite another thing to say that Congress may, as a global or general matter, and without particular evidence of abuses in the particular cases at issue, conclude that the risk of abuse is sufficiently great as to call for disclosure in all cases. There is no precedent, in law or practice, to support that much broader conclusion. Cf. Senate Select Committee on Presidential Campaign Committees v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), in which the court held that a senate committee's need to have information bearing on its investigation of Watergate-related issues was insufficient to outweigh the privilege.

C. Appraisal. Despite these considerations, probably the best prediction is that the Supreme Court, deferring to legislative judgments in this complex and contentious area, would uphold section 112. Perhaps the court would rule that the privilege does attach to OMB contacts, but that Congress need not surmount the high burden it must meet to overcome the privilege when the President is personally involved. Perhaps the general allegations of OMB abuses would be sufficient to overcome whatever privilege might exist with nonpresidential communications. Perhaps the very fact that OIRA has been disclosing similar material of its own accord would cast doubt on the argument that the Constitution requires this material to be kept secret in the interest of the performance of executive functions. Cf. Nixon v. Freeman, supra.

But even if the Court would uphold section 112 because of its deference to the constitutional judgment of the legislature, a Congress that is itself attentive to the constitutional issue might well make an independent assessment of that very issue. That assessment should probably lead Congress not to enact section 112 in its current form, and precisely because of the constitutional obstacle. This argument has particular weight in view of the fact that OMB is currently disclosing this information on its own initiative (or in consultation with Congress). It receives still further weight from the fact that compulsory disclosure, by one branch, of communications within another branch should be disfavored without powerful and particular showings of need. Such disclosure is highly likely to threaten legitimate interests in allowing for tentative give-and-take, for exploration of varied alteratives, and for full candor in the process of discussion. It is also likely to convert written communications to oral ones, and there is little to be gained from that. The concerns about OIRA's reviewing process, also important and legitimate, can probably be met in other ways.

D. Possible amendments. One possible solution to the competing considerations would be to allow deliberative communications that are part of policy debates to be kept secret, but to require disclosure of (a) matters that involve times and places of meetings, see Wolfe, supra, and (b) any material factual information that has been introduced by OIRA into the rulemaking process. This latter step has been proposed both by the Administrative Conference of the United States, see Rec. 806, Recommendation on Intragovernmental Communications in Informal Rulemaking, 45 Fed. Reg. 86407, 86408 (Dec. 31, 1980), and the American Bar Association, see Appendix to Strauss & Sunstein, Presidential Control of Informal Rulemaking, 38 Administrative Law Review 181 (1986). (A related distinction can be found in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) and in Memordandum for the Heads of Departments and Agencies Subject to

Executive Order Nos. 12291 and 12498 from Wendy L. Gramm, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (June 13, 1986).)

The reason for the distinction is that disclosure of purely factual material ought not to chill the deliberative process. New facts -- from the agency or OIRA -- are part of the basis of any rule that is ultimately issued and should therefore be made part of the file for the public and the courts. A requirement of disclosure of facts would be unlikely to interfere with open-ended discussion within the executive branch. At least as a general rule, it would therefore not call up the same considerations that justify executive privilege.

An amendment of this sort would not call for fundamental changes in section 112. It would require merely the deletion of section 3518(a) and section 3518(b)(1) (A), (B), (C), and 3518(b)(2), and the addition of a new section requiring disclosure to the public of factual information introduced by OIRA.[3]

An alternative to this approach would be for Congress to engage in more informal processes with OIRA, encouraging it to require full disclosure to the extent OIRA deems such disclosure consistent with its mission. See Congressional Record E 3925

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[3] Of course the distinction between factual and nonfactual information is not completely crisp. In most cases, however, it is clear on what side of the line information falls, and OIRA should administer any such distinction by reference to the goal of allowing unimpeded policy deliberation -- evaluations, values, competing considerations -- rather than undisclosed factual information, which belongs in the public domain.

(November 15, 1989) (statement of Rep. Conyers, announcing "administrative agreement" between Representatives Conyers and Horton and Richard Darman of OMB). Such informal mechanisms have the advantage of allowing flexibility and a degree of voluntariness within the executive branch with respect to the disclosure of its internal communications.

It would, however, almost certainly be desirable to supplement those mechanisms with at least some version of current section 112. Exclusive reliance on informal arrangements would be less likely to bring about compliance and it would probably not allow for judicial enforcement. Worse, informal arrangements would not make permanent the salutary functions of section 112, which, unlike those arrangements, would represent an important statutory addition to the APA, recognizing and responding -- for the first time -- to the changes brought about by the recent involvement of OIRA in government regulation.

Conclusion

Section 112 of S. 1742 is fundamentally sound. It is broadly consistent with the Constitution; it recognizes the current need for coordinated management of the regulatory process; and it responds to legitimate problems in current practice, arising from delay, from a perhaps excessive antiregulatory bias in some settings, and from secrecy in the nondisclosure of substantive communications between the executive branch and private persons. But in order to avoid a serious constitutional question -- and a probably unnecessary intrusion into deliberative processes within the executive branch -- the section should be amended so as not to require disclosure of policymaking discussions between OIRA and the relevant agencies.

STATEMENT OF STUART EIZENSTAT
ON BEHALF OF
THE COALITION FOR REAUTHORIZATION OF
THE PAPERWORK REDUCTION ACT
ON S. 1742
BEFORE THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE
FEBRUARY 22, 1990

Good morning. Mr. Chairman, I am Stuart Eizenstat, a partner in the firm of Powell, Goldstein, Frazer and Murphy. I am testifying here today on behalf of the Coalition for Reauthorization of the Paperwork Reduction Act, a group comprised of multiple industry, trade, professional and citizen associations and a diverse group of American businesses. I have attached to my testimony a list of those entities participating in the coalition whom I am representing here today.

My principle purpose this morning is to seek the reauthorization and strengthening of the Paperwork Reduction Act and to urge you to retain the principles and purposes of this important public law. As President Carter's Chief Domestic Policy Advisor, I was personally and directly involved in the development and enactment of the Paperwork Reduction Act, and I am proud of the public policy legacy which it represents. The Paperwork Reduction Act was an important reform measure in the effort to make government less intrusive and more sensitive to the concerns of the American people.

In this regard, I understand that President Carter has communicated with you, Mr. Chairman, urging that the basic thrust of this Act be retained. We strongly agree.

My remarks this morning will be made in the context of the current Paperwork Reduction Act now on the books and will describe some of our reasons for urging its reauthorization. I will also later offer our observations on S. 1742, which was introduced in 1989, and which is also before this Committee for consideration.

You may recall, Mr. Chairman, that the Paperwork Reduction Act followed the work of the Federal Paperwork Commission which was appointed by President Ford. The Act itself was crafted during the Carter Administration. The Congress passed and President Carter signed the law in 1980. This law was thoroughly debated before its enactment. Indeed, I think it is significant that this was a bipartisan effort involving the President, key Democratic members of Congress such as Lawton Chiles and Abe Ribicoff in the Senate and Jack Brooks in the House, together with key Republicans, John Danforth and Bill Roth in the Senate and Frank Horton in the House. They shared the belief that the Paperwork Reduction Act was not a matter for partisan division, but should be in place no matter which party held the White House.

That was a decade ago. I believe many of the issues before you today are similar to those we faced then.

For reasons which I believe are quite similar to those of other public groups who must respond to the Government's ever growing information needs, we are vitally interested in preserving and building upon the processes established by the Paperwork Reduction Act. We hope this Committee will seize upon the occasion of reauthorization of the Office of Information and Regulatory Affairs (OIRA) to further encourage, and not retreat, from the management principles and structure of accountability to the Congress and the American people that the framers of the Paperwork Reduction Act put in place.

Mr. Chairman, in the 100th Congress, this Committee mandated a study of the extent of the paperwork burden in the procurement process by way of the Office of Federal Procurement Policy Act Amendments of 1988. The report was issued just this past month.

The Administration's estimate is that 289.5 million hours are expended annually by the contracting community to meet procurement paperwork requirements. It is a fair assumption that the financial cost of what we consider to be an exceedingly conservative estimate is passed on to the taxpayer. Even at an estimated minimum of 50 dollars an hour average for the cost of compliance with the Government's paperwork requirements, that burden amounts to 14.5 billion dollars. However, we believe that even these estimates grossly understate the actual burden associated with procurement paperwork.

As anyone who has ever done business with the U.S. Government can tell you, that estimate of paperwork burden is patently ridiculous. The paperwork associated with federal contract actions and requires hiring many full-time professionals with the expertise needed to properly comply with the Government's certifications and associated reporting burdens.

In order to illustrate our broader message here today let me select as an example the substantive problem of the paperwork burden associated with government procurement from commercial companies. Indeed, we are deeply concerned about the extraordinary amount of reporting and recordkeeping with which small and large commercial companies of all kinds must comply with in connection with the Government's annual purchase of billions of dollars of goods and services.

Clearly, the Federal procurement process desperately needs reform in this area. In 1972 the Commission on Government Procurement recommended that for economy and efficiency the Federal Government needed to increase its reliance on commercial and off-the-shelf products and streamline its acquisition process.

The Grace Commission in 1984 and the Packard Commission in 1986, made similar recommendations, but with a greater sense of urgency brought on by the intervening decade of dysfunction in the government procurement system. Indeed, the Packard Commission recommendations - which many here in the United States Congress embraced - addressed in detail the need to remove impediments to the acquisition of commercial products. Those impediments are principally of a paperwork nature. For example, often commercial companies are asked to submit detailed product cost and pricing data with their federal government sales, even when procurements are conducted under full and open competition. While commercial firms are willing to compete for the Government's business, they find that the acquisition system is strangling them with excessive and counterproductive information reporting requirements.

This growing paperwork burden on the commercial sector was explored in detail just last year in an outstanding series of hearings conducted by Senators Levin and Cohen in your own Subcommittee on Oversight of Government Management, and resulted in passage of a reform initiative in last year's Defense Authorization Act. Unfortunately, this initiative will only be felt inside the Department of Defense.

What is needed is a new Government-wide mandate to reduce the reporting burdens of government procurement. We believe that the Reauthorization of the Paperwork Reduction Act is the right opportunity to deal with this critical element of public policy. In this regard, I would also like to submit to you at this time a letter from David Packard in which he shares his thoughts on this issue.

The extraordinary role which paperwork plays in the procurement process is staggering. Whether it is through utilizing new information technology or the elimination of no-longer-needed requirements, with a few hours reduced here and a few hours eliminated there, multiplied by many thousands of respondents, you can save billions of otherwise unproductive dollars. That is one reason the Act's present purpose of minimizing burden and minimizing cost is still relevant and indeed critical.

Equally important is the objective of ensuring that the information burden actually has practical utility. This goes to the heart of proposals to improve government contracting practices. One need only look at the Packard Commission recommendations to see a number of illustrations of this point.

Excessive information burdens inhibit the number of suppliers the Government can rely upon. Minority, disadvantaged and small businesses are often not capable of dealing with the complexity and costs. Many such firms find Government business to be less attractive than that with other sectors of our economy. We believe that the cumulative paperwork burdens attendant to the procurement process increase costs without an economic benefit and are a threat to our defense industrial base and our global competitiveness.

Even more telling is the admission by many past government officials, which is undoubtedly shared privately by many present ones, that much of the procurement-related information collected is never actually used by anyone, but is retained in federal files simply for the purpose of avoiding potential criticism if it were to be found that such information had not been collected and filed.

While progress is slow, the Paperwork Reduction Act does require that agencies justify their information requests on the basis of actual need and practical utility, submit them for public comment, and subject them to an independent check by the Office of Management and Budget (OMB) for review and approval. If this is not followed by an agency, the public protection provision of the Act declares no one may be penalized for failing to provide the information. The three-year sunset provisions of the law help ensure periodic review of agency requirements. We cannot afford to lose or diminish these public protections.

This is particularly noteworthy because Government contractors may be the only community where the supplier is regulated by the customer. Having a designated outside body to ensure that you get a chance to comment provides some balance to the process. I have found, based on my experience in the Whit House, that absent the potential of disapproval by OMB, there is little or no incentive for the agencies to follow the information management principles contained in the Act. In my judgment, there must be central oversight over the Executive Branch by the Executive Office of the President. As the Chief Executive Officer of the Executive Branch, this is an indispensable management tool for the President.

The procurement community wants to see this process continued and strengthened. The requirements for public participation, public protection, and OMB review contained in the Paperwork Reduction Act are critical to preserving the integrity of this process.

Mr. Chairman, let me quickly turn to our specific comments and recommendations with regard to S. 1742:

1. We support reauthorization but believe it should be for a longer period in order to provide more continuity, productivity, and stability.

2. We recommend retaining the current law's stated purpose "To minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information" found in Section 3501(2). This purpose is omitted from S. 1742's rewrite of the "purposes" section.

3. We support the S. 1742 amendments to Section 3506 of the Act which increase Agency responsibilities to better manage "information resources" and to better ensure that agencies seek meaningful public participation in the development of information requests upon the public. We specifically endorse the language of the new Section 3506 (E) of S. 1742 which mandates that an independent official within an agency determine that a proposed information collection request meets the standard of "need and practical utility" before the Agency submits the proposal for outside review by the Office of Information and Regulatory Affairs (OIRA).

4. We strongly recommend deletion ~~of the~~ Amendment to Section 3507(D) which would remove the protections of the current sunset provisions of the Act. Without automatic sunset of information collection requirements, the government will have no meaningful stimulus to cause review and justification of continuing Federal reporting burdens. The sunset provision has been a consistent part of these policies, even dating back to President Carter's Executive Order in 1979, which preceded enactment of the Paperwork Reduction Act. To delete that provision now might render the Act irrelevant over time, a result which I am sure no one wishes or intends to cause.

5. On similar grounds we strongly recommend the deletion of the proposed new section 3507(J), which provides that information collection decisions by Agencies would have to be found by OIRA to be "arbitrary and capricious" in order for OIRA to have the authority to overrule. This contrasts sharply with the current standard of the law (i.e., "necessary") where agency justification and OIRA review are set forth in Section 3508 of the Act and are essentially the same as have existed since 1942 with the passage of the Federal Reports Act, the predecessor to the 1980 Paperwork Reduction Act. We do not recommend changing the current plain English standard which requires that Agency information collection requirements must be "necessary". An "arbitrary and capricious" standard might be appropriate to Judicial Branch review of Executive Branch actions, but is inappropriate for managerial review by the Executive Branch office which is charged with the responsibility to oversee compliance of the sound management objective of paperwork reduction. The unreasonable standard of "arbitrary and capricious" renders any paperwork review process meaningless.

6. We support the proposal for a new Commission on Information. However, by giving OIRA only a two-year reauthorization, it is unlikely that a Commission can achieve its goals in this short time-frame. In addition, without appropriate increases in funding, it is unlikely that the Commission can be successful.

7. We recommend the addition of language which reduces the paperwork associated with procurement from commercial companies.

Mr. Chairman and members of the Committee, I look forward to your questions.

MEMBERS OF THE
COALITION FOR
REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT
INCLUDE:

AEROSPACE INDUSTRIES ASSOCIATION
AMERICAN ELECTRONICS ASSOCIATION
AMERICAN SUBCONTRACTORS ASSOCIATION
ASSOCIATED BUILDERS AND CONTRACTORS
ASSOCIATED GENERAL CONTRACTORS OF AMERICA
BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK
COMMERCIAL PRODUCT ACQUISITION TEAM
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION
COUNCIL FOR CITIZENS AGAINST GOVERNMENT WASTE
ELECTRONIC INDUSTRIES ASSOCIATION
NATIONAL ASSOCIATION OF MANUFACTURERS
SMALL BUSINESS LEGISLATIVE COUNCIL
UNITED STATES CHAMBER OF COMMERCE

NFIB

National Federation of
Independent Business

STATEMENT OF

SALLY L. DOUGLAS

ASSISTANT DIRECTOR, RESEARCH AND POLICY

BEFORE: Senate Committee on Governmental Affairs

SUBJECT: S. 1742, the Federal Information Resources Management Act

DATE: February 21-22, 1990

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The Guardian of
Small Business

Mr. Chairman, my name is Sally Douglas and I represent the over 570,000 small business members of the National Federation of Independent Business. Our membership parallels the national business population in that approximately 50% of our members own retail and service enterprises; 25% are in manufacturing and construction; and the remaining 25% operate agricultural, transportation, mining, wholesale, financial, insurance or real estate enterprises. The average NFIB member has 13 employees and grosses about $350,000 in annual sales.

We are pleased to have the opportunity to testify today on the important subject of paperwork reduction and information management, and we thank you for holding these two days of hearings.

NFIB has been fighting to reduce the burden of government paperwork for over ten years and we are proud to have helped work for the passage of the original Paperwork Reduction Act (PRA) in 1980. We represented the small business community on the Commission on Federal Paperwork in 1976-77, and I served as a commissioner representative to the panel. More recently, NFIB supported the reauthorization with amendments of the PRA in 1986. Needless to say, these efforts were eagerly supported by the small business community.

Mr. Chairman, this committee could hold days of hearings on the merits of the Paperwork Reduction Act and hear testimony from a myriad of businesses and other representatives supporting the Act. The fact is that government-imposed regulatory and statistical *paperwork is the most direct and consistent link that businesses have to the federal government. No single facet of the government's regulatory activities has a greater impact on the universe of small businesses than paperwork.*

Paperwork reduction is not just an esoteric concept. It has serious economic implications not just for small firms, but for the federal government as well. Let me give you an example.

A large portion of the small business community is made up of construction firms, 80% of which have fewer than 10 workers. Excessive paperwork burden imposed by laws such as the Davis-Bacon Act often force these companies to hire additional clerical help and purchase expensive recordkeeping equipment.

There are currently 11 million weekly payroll reports submitted annually to contracting agencies because of the Davis-Bacon Act. These reports cost an estimated 5.5 million hours of employee time to compile. The U.S. Department of Labor estimates the paperwork cost to contractors at $100 million a year.

Unfortunately, many small construction firms choose not to participate in federal construction projects rather than comply with these costly requirements. The resulting decrease in competition, along with other constraints under the Davis-Bacon law, adds over $1 billion per year to federal construction costs, according to Congressional Budget Office estimates. Simply switching to a quarterly reporting system would save small firms significant time and money and increase competition for federal contracts, which *would lower the cost to the federal government.*

The PRA and the Office of Information and Regulatory Affairs (OIRA) are really all the business community, and society as a whole, has to keep a lid on government-imposed paperwork. Consider the recent experience with OSHA's Hazard Communication Standard.

HazComm requires maintenance and distribution of Material Safety Data Sheets (MSDSs), technical documents furnished with every product which may present some chemical hazard. In no time at all, the number of these forms an employer has to handle can escalate to unmanageable numbers.

In its ruling, OMB determined that two specific provisions of HazComm violated the PRA. First, it determined that the definition of consumer product, exempted from coverage under the rule, was too restrictive and prevented a wide array of products from being exempted. Second, OMB ruled that a provision requiring the maintenance of MSDSs on multi-employer job sites (e.g., construction sites) created an excessive paperwork burden. OSHA was also instructed to develop training assistance for employers. The remaining portions of the rule were approved and left intact.

HazComm is a good example of the PRA working as it should, protecting small businesses from excessive paperwork burdens and making allowances for smaller firms to participate in the regulatory process, without jeopardizing the goals to be achieved by regulation.

The scope of OMB's review of HazComm under the PRA was the *subject of a Supreme Court case heard in November. The government had argued that OMB's review was proper and their findings should stand. On February 21, 1990, the Supreme Court ruled against the government's position in the HazComm case, stating that OMB may not block or change rules made by agencies. This, we believe, is an unfortunate decision which Congress should investigate.*

Few, ourselves included, would dispute the importance of this Act to the small business community. I am disappointed to say, however, that the Act has not been as great a success as we had envisioned back in the 70s. Consider these statistics: In 1988 alone -- nearly ten years after enactment of the PRA -- small business owners still spent a billion hours filling out government paperwork, at a cost of $100 billion.

These figures, Mr. Chairman, represent the most conservative estimates of the paperwork burden we've seen. And small firms, with often precarious and limited resources, are disproportionately affected by excessive government paperwork burdens. According to the U.S. Small Business Administration (SBA), the paperwork cost to small businesses is three times higher per employee than for other businesses.

Minimizing the flow of government demands for information is an ongoing process. Virtually every new law passed by Congress and every new regulation promulgated by federal agencies, adds more paperwork requirements to the already existing burden.

With this in mind, NFIB believes that this is the time to

strengthen the PRA, not weaken it. We support full reauthorization of OIRA and the preservation of the PRA's original intent. The NFIB will oppose any limitations on the scope of OMB review of paperwork burdens or any limitations on OMB's current authority to monitor agency compliance. MOB review, couples with strong and consistent oversight by Congress, is key to any success in mitigating the federal paperwork burden on individuals and businesses.

1986 Amendments

The PRA amendments enacted in 1986 expanded agency information resources management (IRM) responsibilities, and clarified OIRA's authority and responsibility in several areas. The amendments said that OMB's paperwork clearance function applied to all information collections equally, whether rule-based or not. The changes also injected more sunshine and accountability into the process and assured that the public had sufficient information on OMB reviews to participate. Changes included the following:

--required a detailed account in the Federal Register of agency submissions describing the need and proposed use of the information, the likely respondents, frequency of response required, and an estimate of the burden;

--required all written communication between the public and OIRA to be available to the public;

--required annual reports to Congress on the progress of

federal information management within the agencies.

These positive changes allow for more sunshine in the process while maintaining privacy and security of records. Mr. Chairman, we would submit that these amendments, in effect for just three years, have not been given sufficient time to work. Those who say that more sunshine is needed in the clearance process have not given these amendments a fair chance.

S. 1742, The Federal Information Resources Management Act

During the drafting of S. 1742, we were able to produce several positive changes in the bill that we believe will strengthen certain aspects of the paperwork reduction process. These include an important expansion of the definition of paperwork "burden" to include time and resources required to review, compile, and maintain information and complete specific forms.

Other positive changes give agencies more responsibility for review of their own information collection requests, require trained career professional IRM officials, require use of the Federal Information Locator Service (FILS) to help cut down on duplicative and unnecessary collections, restore "practical utility" to its original definition, and strengthen the "Findings" and "Purposes" sections of the bill.

Notwithstanding these positive changes, we are gravely concerned with Sec. 107 of Title I, which details separate *procedures for reviews of rule-based and non-ruled based collections which are ongoing. What is the logic for two different review procedures? We dislike this section for three reasons:*

1. *According to S. 1742, the three-year review process in the current law will apply only to non-rule based requests.*

   However, since OMB estimates that 90% of information collections originate from a rule or regulation, the majority of requests could effectively be removed from the three year review process. Rules and regulations produce not only the most information collections, but the most burdensome ones. To remove these from the process would abrogate a fundamental element of the current PRA and constitute a backward step in the battle against excessive paperwork. (The bill charges OMB to identify initiatives to reduce the burden of federal paperwork, and then virtually eliminates the independent review process that reviews 90% of that burden.)

2. *This section further limits OMB authority by allowing an OMB override of agency self-certification only if the agency "decision on continuing the collection activity was arbitrary and capricious". This is an extremely tough standard to meet especially for paperwork already in effect, and will likely discourage OMB from challenging agency review. Again, this directly undercuts one of the original intents of the PRA -- independent clearance authority for OMB.*

3. *While we are generally supportive of giving the agencies increased responsibilities to control their own paperwork burden, the system simply will not work without the "teeth" of the OMB Director's final review authority. Self-certification in this context is an impractical and ineffective concept. Frankly, it is like putting the fox in charge of the henhouse. It assumes that agencies, even with a "sufficiently independent" IRM office, will keep a strict watch over their own information collection requests, even without an outside central reviewer to make the final decision. That's a giant leap of faith that we are not prepared to take. (This is part of the reason we enacted the PRA in the first place.)*

As an alternative, we support allowing the agency IRM official to review a request, and approve, disapprove, or make necessary changes before submission to the Director. The Director, of course, would have final approval authority.

Mr. Chairman, the review procedures proposed by this bill are unacceptable to us.

Another fundamental problem, we believe, is the flawed assessment by agencies of the actual burden imposed by a particular information collection. We support increased small business participation in assessing realistic paperwork burdens and the formulation of paperwork requirements. As a part of this, we support addition of a "burden box" to let the business or individual *know of the agency estimate of the time needed to fill out the form. To take this idea further, we would suggest also that there be a place to fill in the actual time it took to complete the form.*

Conclusion

The review procedure proposed in S. 1742 is unacceptable to the NFIB as it would weaken the process by which ongoing collections of information are reviewed. We would, in fact, argue that it effectively exempts up to 90% of all reviews. These changes fundamentally alter the PRA, and, given the choice, Mr. Chairman, we would support straight reauthorization of OIRA over the bill currently before us, S. 1742.

Mr. Chairman, opponents of the PRA have accused OMB of overstepping its authority and injecting political ideology into regulatory decisions. NFIB strongly supports the PRA and, indeed, the entire concept of reducing unnecessary and duplicative paperwork. And we strongly support OMB's efforts within the legitimate confines of the law. This law is all that small business and society at large have to control the government's insatiable appetite for information.

NFIB believes in the positive value of federal information and we understand the government's need to collect it. However, there is simply no need for two federal agencies collecting the same information, or for forms to be incomprehensible to the average small business owner. In order for the regulatory process to work, the business community must participate. Laws like the PRA, and the Regulatory Flexibility Act, improve participation in the regulatory process, and therefore should be preserved.

Testimony of Local 2050

National Federation of Federal Employees
on S. 1742
The Federal Information Resources Management Act of 1989
Given by J. William Hirzy, President-Elect

Mr. Chairman:

I am William Hirzy, President-elect of Local 2050, National Federation of Federal Employees. Our union represents the 1100 professional employees at EPA Headquarters, many of whom participate directly or indirectly in EPA's activities related to the Paperwork Reduction Act (PRA) and information resources management. Thank you for the opportunity to testify on this Bill and on other activities of the Office of Management and Budget (OMB) under Executive Orders 12291 and 12498. My oral testimony will be based on one specific example of how the PRA review process at OMB affected EPA's effectiveness and employee morale, and it will offer a recommendation that the union believes will improve both. I have also submitted written material comprising the union's testimony given last year before Mr. Conyers' and Mr. Sikorski's Committees of the House of Representatives addressing OMB's "review" activities under the PRA and the Executive Orders. This earlier testimony also contains recommendations of the union for improving the way EPA carries out Congressional mandates for environmental programs. Finally, the written material also includes an analysis of the basis for OMB's interference with Congressional intent on environmental (and other regulatory) matters.

In 1987 EPA was engaged in the development of an effluent guideline regulation for the pesticide industry, pursuant to the Clean Water Act. One element of this process was to gather information from the regulated community by means of a survey. EPA designed a survey instrument and submitted it to OMB for review in December 1987. EPA also published a notice of its submission in the Federal Register and invited public comment.

In January 1988, EPA and OMB received word that the National Agricultural Chemicals Association (NACA) objected to some aspects of the survey. At this point (about 30 days into the OMB review period), OMB informed EPA informally that the new survey instrument would not be cleared until EPA met with NACA to discuss the objections.

EPA was taken aback at this development, but moved immediately to resolve the problems by meeting with representatives of NACA and the Natural Resources Defense Council (NRDC), an environmental organization which expressed concern about the delay in the rulemaking. In an attempt to keep the rulemaking project on schedule, EPA held three meetings with industry and NRDC during the remainder of the 90-day OMB review period, one of which was also attended by OMB staff. EPA was unable to elicit from NACA a clear statement of the industry's objections to the survey, other than statements about the sensitivity of providing confidential financial data. This objection is not a valid cause for disapproving a survey under the PRA: EPA demonstrated the need for the information in its submission to OMB, and had a complete set of procedures to protect confidential business information. Nonetheless, OMB saw fit to disapprove the economic portion of the survey at the end of its review period (April 1988), stating that EPA had failed to "collect the financial data in the least burdensome way" and did not "demonstrate the practical utility of certain financial information."

EPA staff saw the OMB rejection as disingenuous, since the OMB staff had acknowledged early in the review period--before the NACA contacts--that the survey was well designed. EPA had also experienced continued opposition by OMB to development of the effluent guidelines program. It seemed that the "burden" and "practical utility" explanation was a convenient way of delaying or weakening the regulation as part of the Administration's overall policy of opposition to environmental regulation.

Since EPA's position was that the disputed economic questions were essential to the rulemaking project, it proceeded to elicit further comment on the form from several individual pesticide companies (several others had been contacted prior to the OMB review). Upon finding that some individual companies found the survey generally acceptable, EPA proceeded to inform NACA, NRDC and OMB of this at a meeting in August 1988. Industry officials acknowledged at the meeting that EPA had demonstrated that the survey had "practical utility," but they did not withdraw their objections.

It is ironic to note that in 1986 the pesticide industry had successfully challenged a previous EPA effluent guideline rulemaking on grounds of inadequate supporting data, and now was trying to prevent EPA from developing a more comprehensive data base for its rulemaking record.

EPA prepared a re-submission to OMB in the Fall of 1988, with the original survey design, supported by an expanded justification statement. After the survey was re-submitted to OMB, NACA officials requested a meeting with Assistant Administrator Fisher and Acting Assistant Administrator Hanmer. At this meeting, NACA restated its objection to providing sensitive financial data, and EPA management, in attempt to keep its rulemaking project going, searched for a compromise that would require somewhat less data, but without weakening the regulation. A compromise was developed that made the completion of several questions optional for respondents, with the understanding that where a company chose not to provide the data, EPA would have to make certain assumptions about the firm in its economic models, as it developed the regulation. OMB was informed of the agreement, and after some additional delay, it approved the survey, one year after the initial EPA submission. Promulgation of the final rule will be delayed at least six months by this incident.

The lesson we draw from this example is that OMB too often expresses a mind set that any paperwork required of the regulated community is suspect, and EPA must, through the kind of delay imposed in this case, be forced to prove that information requests are not too burdensome. We do not contend that EPA has never made a too burdensome information request, nor that a governmental entity such as OMB serving as watch dog is always superfluous and a hinderance to good government. Clearly, some level of review is warranted.

What we do contend is this: with ever improving EPA operation, with a greater degree of early, cooperative interaction among affected parties, with better professional accountability and tighter internal and external peer review of work products, as was the case in the development of and the reviews given the survey instrument in this case, the burden of proof should shift to OMB's shoulders. The current language in the PRA gives OMB very broad powers. It can determine whether a collection of information is "necessary for the proper performance of the functions of the agency" and whether the information will have "practical utility." [Sec. 3504(C)(2)] it is very easy--and tempting--for OMB to interfere with EPA's substantive regulatory decisions by questioning the "practical utility" of the data to be collected. Although the PRA does currently state that OMB authority shall not be decreased or increased with respect to Departments and Agencies [section 3518(e)], in reality the PRA has increased OMB's ability to delay and/or influence regulations by deciding when, if at all, an agency may collect information, and what the content of those collections will be.

We believe that you in Congress should set the level of proof required in such OMB actions. We believe that such a change would not only improve the efficiency of government directly by streamlining the OMB review process, but it would also have an indirect benefit by stimulating cooperation among the social entities involved and by improving EPA employee morale. When EPA employees know that professionalism is to be honored, not thwarted, in the OMB review process, they will have greater motivation to first-class work and their view of OMB can change from one of antagonism to one of collegiality. This changed situation will benefit all parties--environmental groups, the regulated community, EPA and OMB, and Local 2050 urges you to consider making it possible in this Bill.

We also ask that you take steps to keep OMB out of the business of substantive review of professional work products, especially scientific work products such as risk assessments. There is already sufficient political control over the use of scientific work of the Civil Service--some would say too much political control. To have a bunch of junior-grade, marginally qualified (at best) "analysts" at OMB, who are under constant pressure to twist the professional work of sworn-to-duty civil servants to fit a partisan agenda, is to invite further well-justified degradation of the public's confidence in government. We in the Civil Service, like you in Congress, want to take pride in our work and we want the public to recognize our work as worthy of pride.

Help us make professionalism and quality the watch-words of the Civil Service work by keeping OMB on the track of improving information resource management. Keep OMB--and by implication, partisan politics--out of the execution of our professional duties.

Thank you, and I will be happy to answer questions.

Testimony of Local 2050 National Federation of Federal Employees. Representing the Professional Employees of the U.S. Environmental Protection Agency: Impact of OMB, Actions on Science, Employee Morale and Efficiency of the Service. Presented before the Civil Service Subcommittee by Union President William Hirzy, May 17, 1989.

Mr. Chairman:

I am William Hirzy, President of Local 2050, National Federation of Federal Employees. Our union represents the 1200 professional employees at Headquarters, U.S.Environmental Protection Agency. Thank you for the opportunity to testify on the impact on employee morale of certain activities of the Office of Management and Budget relating to EPA and its mission.

Let me say first that the material in my testimony was gathered in a rather short time and without any formal effort. If we were to spend a person-month on this sort of project, we could present you with a much more detailed and extensive list of "incidents".

I have arranged this testimony to cover four kinds of OMB influences on science and employee morale at EPA: 1) involvement with non-economic assessments, i.e. OMB "reviewing" scientific or engineering content of rules; 2) OMB controlling access to data required for scientific assessments; 3) OMB advising against considering science in rulemaking; and 4) sub rosa impacts not easily classified, e.g. delaying reviews, consulting interested parties off the record, and undocumentable impacts on management decision making criteria (i.e. an agency work group chair saying in response to some idea or proposal "that'll never get by OMB").

I will cite two examples of OMB's intrusion into non-economic assessments: the proposed rule on light-duty truck hydrocarbon and carbon monoxide emissions, and a proposed suspension of registration of Alaclor. In the first of these, OMB questioned the conclusions in the rule package concerning the severity of immune system effects and of irreversible lung damage related to ozone produced as a result of hydrocarbon emissions. The conclusions in the package were in fact judged to be correct for normal atmospheric conditions and were not, as OMB held, a "worst case" scenario designed to frighten the public. In the Alaclor case, a decision to suspend the pesticide's registration had been reached by agency scientists and management, based on the carcinogenicity of the chemical.....But OMB refused to clear the action saying that there was not enough evidence......As a result of OMB's action, not only was morale affected, but the Office of Drinking Water had to propose.....removal of Alaclor from groundwater-supplied drinking water systems. This transferred a substantial economic burden from the manufacturer to the public, estimated at millions of dollars per year.

When dedicated civil servants, sworn to protect the public interest, see this kind of thing it sometimes drives them out of the Service--or out of their minds with rage. It colors their actions in subsequent work: "Why bust my tail doing a first-rate job when it'll just get torpedoed by OMB"?

Another pernicious influence of OMB on the Agency, its mission and the morale of its staff is that of limiting access to information....(U)nder the (OMB) system.....choices have to be made among which programs will get how much information--the wrong questions get asked. Instead of, "What do we need to know about this problem to deal with it most effectively"? we are faced with "What is left in the budget and how must we parcel it out among all the programs needing information"?...This situation can best be characterized as part of the low-intensity, OMB frustration factor in the Civil Service that gradually eats away at employee morale in an agency like EPA. Right now, there are such limits being placed in the path of getting out a good rule on regulation of the biotechnology industry...

The third type of adverse impact is felt when OMB advises the Agency not to consider science at all in rulemaking...(O)mb wrote in a letter to EPA on April 26, 1985, that setting a secondary, unenforceable standard for fluoride was preferred: "...In our view it would avoid the difficulty of searching for an adverse health effect..." Science, according to OMB...is only useful when it is easy. This signals the staff that "cookbook" science is not only acceptable, but preferred. You can imagine what effect that signal has on morale, on the quality of work delivered to the public, and on encouraging first-rate scientists to jump ship.

The most difficult to document, but also the most insidious and most damaging way OMB influences the Agency and its employees' is the "black hole" technique...The trihalomethanes drinking water rule languished in OMB for no apparent reason. Finally, you in Congress took steps to restrict OMB's funding, and the rule re-emerged from the black hole. Your efforts to make our work effective were appreciated. In a similar case, a drinking water rule on radio-nuclides disappeared for 6 months at OMB...(O)mb wanted to have the rule's risk level presentations changed in an unscientific way....instead of the range of risks from certain levels of radio-nuclides being presented, OMB wanted a "most likely" risk number. Staff and management resisted...but, again, a price is paid in terms of the low-level frustration factor mentioned earlier--paid by both staff and management.

I end these examples with a summary our union's first run in with OMB in 1985. On February 1, Richard Gross, the Branch Chief responsible for the TSCA asbestos ban/phasedown rules came storming into my office demanding to know, 'What the hell is the union going to do about OMB interfering with these rules'? Since I was at the same press conference as he was at which Deputy Administrator Barnes announced that the rules were being stopped...I was puzzled at his comments--no mention had been made by Mr. Barnes of OMB involvement. In fact I recalled a reporter asking if OMB influence was at work...and Mr. Barnes denied it. Mr. Gross then told me.... he was aware that OMB was holding up the rules until EPA surrendered its right to regulate. To make a long story short, we asked Bob Eckhardt, Congressional 'father' of TSCA, to look into this matter. In short order Mr. Dingell informed EPA of Congress's displeasure and an investigation occurred. Among other things, it was learned that OMB held secret, closed meetings with interested parties, after which it 'put the screws on' EPA...A memorandum of understanding between EPA and OMB was eventually executed in which OMB agreed that no secret meetings would be held under such circumstances in future. Local 2050 takes great pride in this little recognized accomplishment. I would like to conclude with ...the letter we (i.e. 128 OTS staffers) sent to Lee Thomas when we first learned of...this incident; it speaks in terms clear and unequivocal about the pernicious impact of this sort of OMB machination on our morale and our agency's mission.......(The letter is read; its concluding paragraph follows:..'If all future decisions on risk control are to be made by OMB in private consultations with special interests who are not identified in the public record, what is the meaning of our work?..Are we to be simply a preliminary screening group, whose task is to present options to OMB and its unknown clients, and then to await their decisions and execute them? We did not come to work for EPA to do that, and neither, we think, did you. Your Faithful Staff'

Thank you

NATIONAL FEDERATION OF FEDERAL EMPLOYEES
SERVING FEDERAL EMPLOYEES AND THE NATION...SINCE 1917

Local 2050

FEB 14 1985

An Open Letter to the Hon. Lee M. Thomas

The undersigned members of your staff are deeply concerned about the Agency's announcement on February 1. 1985 that we have changed course on regulating asbestos under the Toxic Substances Control Act (TSCA).

In 1973, before TSCA was enacted, EPA began its regulatory investigation of asbestos and by 1979 had published an Advanced Notice of Proposed Rulemaking announcing intent to remove asbestos from commerce under TSCA authority, where warranted. By early 1984, following updated analyses of risks associated with four asbestos products, two rules -- one to ban those products and one to gradually limit asbestos production -- had been drafted. The rules contained an analysis of regulatory options --including use of other agencies' laws -- which showed that only section 6 of TSCA would adequately protect public health. Referral of asbestos risks to the Occupational Safety and Health Administration and the Consumer Product Safety Commission (CPSC) under section 9 of TSCA was expressly ruled out. All levels of EPA management concurred. The rules were sent to the Office of Management and Budget (OMB) for review in August 1984.

Then, under what can only be described as incredible circumstances, EPA announced that, contrary to all previous findings, section 9 of TSCA would be invoked. The implications of this invocation are serious -- if OSHA or CPSC publish an Advanced Notice of Proposed Rulemaking, which could remain unacted upon indefinitely, EPA is prohibited from taking further action under TSCA.

These implications stir painful memories and raise the question whether the "Ship called EPA", that Bill Ruckelshaus and Al Alm attempted to right, is once again in danger.

We want you to know that our disappointment in this matter is not with you nor with Agency management, except insofar as EPA resistance to intrusions of the Office of Management and Budget (OMB) into the open, public notice-and-comment rulemaking process has apparently been ineffective. We want you to know that we are your allies in efforts to restore that process to its rightful status. Your response to employees' concerns that the EPA unions brought to your attention last year demonstrates your integrity and your concern for our working conditions.

This recent retreat on regulating asbestos is -- at its core -- a working conditions issue for us. We take our work in public health and environmental protection -- and our oath to faithfully serve the public interest -- very seriously. The retreat on asbestos makes a joke of our work and represents a threat to the public interest.

Our work becomes a hollow gesture of placating public anxiety about risks when it is subverted. Scientific and legal analyses of the risks from asbestos were carefully done, including analyses of the authorities of the Occupational Safety and Health Administration (OSHA) and the Consumer Product Safety Commission (CPSC) to control those risks. The public needs to know as we at EPA do, that both OSHA and CPSC have had authority all along to regulate the risks that are the subject of the two TSCA rules recently deferred, and communications among the three agencies led to a determination by all the parties that EPA's draft rules would be complementary to any action the other two might take. Furthermore, OSHA has already made clear that the level of risk control that would be applied short of a ban would still be inadequate to protect public health to an acceptable degree.

Thus, a great deal of first rate professional work by the EPA staff and management team, including an explicit analysis of the implications of section 9 of TSCA, which showed inadequate authority under other Agencies' statutes, has been declared invalid by the retreat. It is an outrage.

It is outrageous, especially, because no explanation worthy of the name has been given. The assertion made on February 1, 1985, that section 9 had just been discovered to apply in this case, is an insult to our intelligence and to the public's.

Failure to give a clear explanation of how this risk control decision was made leaves us demoralized and questioning the value of public service work in risk control, and it calls into question the feasibility of continuing "fish bowl" decisionmaking on risk control.

If all future decisions on risk control are to be made by OMB in private consultations with special interests who are not identified in the public record, what is the meaning of our work? What is the public getting for the money spent at EPA? Are we to be simply a preliminary screening group, whose task is to present options to OMB and its unknown clients, and then to await their decisions and execute them?

We did not come to work for EPA to do that, and neither, we think, did you.

Your faithful staff

B2 [illegible] 20, 1984

THE FEDERAL DIARY

Advice to Conservatives

By Mike Causey

The conservative think-tank that helped guide President Reagan in his takeover of the government apparatus four years ago has some advice for political appointees in the upcoming second term.

In a report to be released Dec. 7, the Heritage Foundation advises appointees to keep career bureaucrats on a short le[illegible]nd in the dark. This is to [illegible]sure that the bureaucrats don't sabatoge presidential budget-cutting initiatives they oppose—either for political reasons or because they have a vested interest in keeping the programs alive, the foundation notes.

That tough management advice is spelled out in the chapter dealing with relations between career government executives and political appointees in the foundation's upcoming book, "Mandate for Leadership II: Continuing the Conservative Revolution."

Drafts of the report were presented to top administration officials last week.

Four years ago the foundation gave the administation a blueprint for a conservative take-over of the federal bureaucracy. About 60 percent of the foundation's recommendations, ranging from military management to regulatory reforms, were adopted or implemented by the administration in its first year.

The section of the upcoming report on managing the career civil service was written by Michael Sanera, assistant professor of political science at Northern Arizona University who was formerly an assistant director at the Office of Personnel Management. His advice about keeping career executives isolated and guessing when major policy matters are being decided reflects OPM's own management style during the past four years.

Civil service executives administration is different from the government expansion administrations of Kennedy or Carter," Sanera said yesterday.

He said the executives will be "challenged" to recommit themselves to "the civil service idea," which he described as being able to carry out policy changes they may personally oppose or "that may affect them adversely."

The report advised political appointees to have agendas before they arrive on the job, and to constantly review those agendas to make sure they are what the president wants done.

"The political appointee without an agenda is a ready victim for the bureaucracy," the report contends. "Indeed, the 'agenda-free' political executive may compound this problem. Since he is expected to produce results, he may eagerly accept the career policy agenda for lack of an alternative."

Among the report's other advice to political executives:

- "Control over the process must be retained by the political executive and his immediate political staff. Very little information will be put in writing. Career staff will supply information, but they should never become involved in the formulation of agenda-relation policy objectives."
- Make sure that career executives know as little as possible about intended changes. "Once controversial policy goals are formulated," the report suggests, "they should not be released in total to the career staff.

"Thus, the political executive and his political staff become 'jigsaw puzzle' managers. Other staff see and work on the individual pieces, but never have enough of the pieces to be able to learn the entire picture.

"By operating in this fashion, the political executive maintains control over his political agenda and his political opponents can only guess what the political executive is after. Or they ascertain the true intention at a point in the process when it is too late to mobilize effective

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NATIONAL FEDERATION OF FEDERAL EMPLOYEES
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Local 2050

November 21, 1984

The Heritage Foundation is publishing a "how to" manual for incoming political appointees that instructs them in the ways of keeping the Civil Service from interfering with the "conservative revolution."

Career civil servants take an oath upon entering service to "preserve, protect and defend the constitution." Through that oath career civil servants recognize the right of political appointees to set policy, but we do not surrender our dignity, honor or judgement when we take the oath.

The Heritage Foundation's instructions proceed from the premise that career civil servants are interested only in self-aggrandizement and empire building and furthering special interests.

It is intructive to compare examples of motivation, trustworthiness and dedication to public service displayed here at the Environmental Protection Agency within recent memory. The civil servants who left here in the 1980-82 period did so honorably, believing that they would be unable to continue to carry out the duties expected of them by the public and the Congress. The political appointees who left here in 1983 left in shame or under clouds of suspicion and scandal.

The Heritage Foundation's publication is a bare-faced declaration of war by the New Right on the Civil Service, based on the assumption that we civil servants do not serve the public, but only our narrow self-interest. That is a damnable calumny!

The publication is titled, " Mandate For Leadership II: Continuing The Conservative Revolution." They are well and truly named, being aimed at a revolutionary change in the way that our democracy works.

Unable to change the laws that offend them through the constitutional process of electing people to the Congress, the New Right seeks a subversive alternative. They seek an alternative that does not require open debate in a public forum, where 535 representatives of the people can participate and be held accountable. They seek, through the mechanisms of obfuscation, subterfuge, misinformation and outright lying, carried out in secret if at all possible, to undercut the will of the people as expressed in the laws that the Congress has passed and that they are charged with administering. It is small wonder that the New Right revolutionaries want to keep dedicated civil servants in the dark until " it is too late to mobilize effective counter efforts" (for which read: "to mobilize public and Congressional opinion").

The Heritage Foundation will not be able to prevent us civil servants from bringing the truth of the revolutionary activities of its minions into the light of public view. Our oath demands no less of us!

The New Right has thrown down the gauntlet.

Someone go tell them that the Civil Service has taken it up, and we choose truth as the weapon.

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FOR RELEASE ON DELIVERY
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STATEMENT OF GERALD E. YUNG
VICE PRESIDENT
GOVERNMENT RELATIONS
MEAD DATA CENTRAL
ON BEHALF OF
INFORMATION INDUSTRY ASSOCIATION
BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE

Mr. Chairman and Members of the Committee:

I am Gerald Yung, Vice President for Government Relations of Mead Data Central, headquarters in Dayton, Ohio. I am pleased to be here today to testify on behalf of the Information Industry Association ("IIA"), as the Co-Chairman of its Government Information Policy Committee. Accompanying me is Kenneth B. Allen, IIA Senior Vice President for Government Relations. Our focus is on the information dissemination provisions of S. 1742, the Federal Information Resources Management Act. IIA is pleased to support this important initiative to establish statutory information dissemination principles for application throughout the Federal government. We commend Senator Bingaman for taking the initiative in moving Congress, after years of debate, closer toward writing these principles into law; and we thank you, Mr. Chairman, for holding these hearings and inviting the private sector information industry to respond to this legislative proposal.

THE INFORMATION INDUSTRY

The Information Industry Association represents 850 leading companies pursuing business opportunities associated with the creation, distribution, and use of information. The IIA's membership encompasses the entire spectrum of the information industry, including traditional and electronic publishers, data base providers, financial information vendors, interactive electronic services, computer manufacturers, and telecommunications providers.

America's first information companies were newspapers and publishers. Thanks to the introduction and evolution of new information technologies and communications systems, the information industry has dramatically changed and expanded. Today the information industry encompasses hundreds of companies offering innovative information products and services never before imagined or possible.

For example, through the services of IIA member companies, librarians, students, and researchers are able to gain immediate access to the knowledge contained in hundreds of data bases; our legal community obtains accurate and timely access to judicial decisions and statutory information; industry and government decisionmakers get economic reports and forecasts; inventors gain fast and efficient access to information on patents; the world financial community obtains information upon which it makes investment decisions involving billions of dollars annually; citizens have excellent access to nearly two hundred years of Congressional hearings, reports, and related information; and finally, many of us in this room track the status of Federal legislation. These products and services contribute substantially to our nation's economic growth, making the United States a net exporter of information services -- one of the bright spots in our overall trade picture.

The most important benefit of the private sector information industry, though, is the role it plays in fostering the free flow of ideas and the right of citizens to create, acquire, and use information without fear of government intervention or control. Self-government and self-actualization can only exist and thrive in a society which is not dependent upon government as its source of information. A diversity of information sources, anchored by a healthy private sector information industry is the best safeguard against such dependence. It is important to remember that the ultimate value of the information industry and the emerging information age is not in any one medium or any one provider. The value is in the information -- the content -- and in a diversity of information sources.

MEAD DATA CENTRAL'S SERVICES

Mead Data Central ("MDC") is one of the leading companies in the emerging information industry. MDC delivers computer-assisted information retrieval services worldwide. Our services contain information data bases comprised of over 75 million documents. These data bases grow by more than 50,000 documents each week. We have nearly 2,000 separate data bases online, with an active customer base of over 230,000 individual users who typically perform about 77,000 search requests a day and print out over 2 million pages of information from our data bases each month. Federal governmental bodies using MDC services include the Senate, the House of Representatives, the Federal judiciary, the Department of Justice, the Patent and Trademark Office, the Internal Revenue Service, the Securities and Exchange Commission, and the White House. We also serve the legal, financial, medical, media, and accounting professions, including virtually all medium to large law firms and an increasing number (over 20,000) of the smaller firms as well.

We serve the major accounting firms, T.V. networks, trade associations, the press, consultants, and libraries.

MDC's information services are arranged into subject groupings. These include LEXIS®, a computer-assisted legal research service providing access to Federal, state, and local as well as foreign legal sources; NEXIS®, a computer-assisted news, business, marketing and general information retrieval service; the LEXIS Financial Information Service™ containing broker reports, financial news and regulatory filings; MEDIS®, a medical information service of clinical journals and reference data bases; LEXPAT®, a full-text collection of all U.S. patents since 1975; the National Automated Accounting Research System, a collection of annual reports and proxy information produced in cooperation with the American Institute of Certified Public Accountants; LEXIS Country Information™ Service, which provides news analysis and facts on countries around the world; and the LEXIS® Private Database Service™, which provides a secure, private library for any client, both public and private sector.

Although best known for our legal and media information services, MDC has added a variety of other services as well. Our Dataline subsidiary provides financial information including real-time stock quotes. Our Micromedex subsidiary offers innovative medical services including emergency antidotes and treatment for thousands of poisonous substances and products. It is available in various media including compact disc and is widely used by hospital emergency rooms in life threatening situations.

MDC and the information industry are also actively pursuing strategies for bringing the benefits of the information age to all our citizens. For example, in the past three years MDC has been able to bring its services to thousands of small firms and individual practitioners through joint relationships with bar associations and libraries that allow them to use MDC's LEXIS® service with little or no subscription charges, paying only for the actual documents and time used, however infrequently that may occur.

THE FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

The IIA is pleased to be here today to support the information dissemination provisions of S. 1742, the Federal Information Resources Management Act.1/ I wish to preface my comments by expressing our appreciation for the efforts made by this Committee and its staff in considering our views and those

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1/ These provisions can be found at sections 104(e) (pages 16-19) and 106(3)(F) (pages 23-24) of the bill. Further citations in this testimony are to Title 44, United States Code, as proposed to be amended by S. 1742. IIA takes no position on the other provisions of S. 1742.

of other interested parties. We are especially appreciative of the work done by Senator Bingaman and his staff.

It is important to note that the information dissemination provisions of S. 1742 and of the parallel bill in the House, H.R. 3695, have resulted from extensive discussions among all interested parties. S. 1742 is a compromise with all the strengths and shortcomings of a compromise document. While the bill does not contain everything we would like, we believe it establishes good public policy and urge its enactment. The additional provisions we suggest today are not meant to change the substance of S. 1742, but simply to elaborate on the principles it sets forth.

A. Specific Areas Of Agreement With S. 1742

The information dissemination provisions of S. 1742 accomplish three important goals, all of which we strongly support.2/ First, they impose on the Federal government an affirmative obligation to ensure the widest dissemination of public information, including the electronic dissemination of

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2/ In testimony last year before the Subcommittee on Government Information and Regulation, the IIA set out its general approach to government information dissemination policy, including the principles for a policy framework in this field. We support the relevant provisions of S. 1742 because, in our view, they help advance these principles. See Statement of Kenneth B. Allen on behalf of the IIA, at 5-14 (June 12, 1989).

such information. Second, they set forth clear, Congressional objectives to guide those public officials responsible for Federal information dissemination activities. Third, they place the final responsibility for information dissemination decisions with each agency. Decisions regarding the dissemination of government information must be made within the context of agency statutory mandates.

IIA particularly supports those information dissemination provisions of S. 1742 that:

1. Carefully balance the important roles that the government and private sector should play in the dissemination of public information (44 U.S.C. § 3504(h)(3)(C))

The goal of Federal information dissemination policy should be to ensure that citizens have access to the government information they want and need in the most efficient and effective manner. This goal is best achieved through a partnership in which government, the private sector information industry, non-profit groups, and the library and education community complement one another's activities in providing wide and diverse public access to government information. The method or methods selected for dissemination should be those which best serve the overall public interest within the practical constraints that must dictate all governmental functions.

S. 1742 strikes a proper balance. It requires OMB's information dissemination guidance both to maintain an affirmative role for Federal agencies in the dissemination of public information, and to reflect the view that it is sound public policy for the public and private sectors to share responsibility for information dissemination. This balanced approach will encourage a diversity of public and private providers for public information products and services, which is also a goal of S. 1742.

2. Require OMB to issue guidelines consistent with the goals and requirements of Congress (44 U.S.C. § 3504(h)(1)(A)).

Part of the Paperwork Reduction Act's value was that it established for the first time that there would be a single entity responsible for issuing government-wide information policy: OMB. It is appropriate that OMB should retain a central role in developing policy in this area. The agencies, the public, and the Congress should have one place to go to for clarification of the requirements of S. 1742. At the same time, this legislation improves on the 1980 statute by providing OMB with Congressional guidance regarding the implementation of this responsibility.

3. List the factors agencies need to consider in determining how to fulfill their information dissemination functions, including a consideration of whether equivalent products or services exist before themselves duplicating such efforts (44 U.S.C. § 3504(h)(3)(E))

Given the inherent scarcity of taxpayer dollars and the almost limitless possibilities for public information products and services, agencies have a responsibility to invest taxpayer dollars wisely. S. 1742 would guide agencies in their decision-making by highlighting the key factors that must be considered in deciding how to achieve the agency's public information dissemination goals. One of these factors requires the agency to determine whether an information product or service available from other public or private sources is equivalent to the product or service which the agency is considering providing. If so, then the agency must consider whether the available product or service reasonably achieves the dissemination objectives of the product or service that the agency is considering providing.

This type of analysis will help agencies decide on a case-by-case basis the most effective and efficient way to disseminate public information. For example, in some cases Federal officials may consider direct government dissemination financed through taxpayer dollars to provide the public with access to government information. In other cases the needs of information users may be met at less cost to the taxpayer if the government acts as a catalyst to encourage the investment of private sector dollars in the competitive creation and dissemination of new information products and services. Where the private sector is already disseminating an agency's information, for example, timely public access to electronic copies of an agency's data base often will suffice to get the information widely disseminated (as is the case in the EDGAR program of the SEC).3/

A major stumbling block to the information age will be costs. The government will never have sufficient resources to meet the information needs of all of its citizens. Federal information policy should encourage the maximum investment of both public and private resources in developing and disseminating information products and services. S. 1742 would help achieve this goal.

4. Require agencies to make public information products and services available to the public on a timely and equal basis (44 U.S.C. §§ 3504(h)(3)(B)(i) and 3506(c)(10)(A)).

Timely access to copies of the underlying data base by the private sector information industry, libraries, non-profits, and others makes it possible for the public to have more than

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3/ Mead Data Central is a subcontractor on the EDGAR contract.

one source of products using government information. It promotes diversity of information sources and competition in the retail market for value added services. Even if the government decides to disseminate a product directly to users, the underlying data should be publicly available in a timely fashion.

Moreover, government information available to the public should be available to all members of the public on an equal basis. Permitting the government or its contractors to discriminate against segments of the public in the provision of public information is inconsistent with democratic principles, anathema to a competitive marketplace, and outlawed by the fifth amendment to the U.S. Constitution. Agencies should be required to disseminate information products in an even-handed manner, not barter or trade preferential treatment or otherwise disadvantage some members of the public in their access to government information.

5. Require agencies to provide the public with advance notice when they initiate, terminate, or significantly modify significant public information products and services (44 U.S.C. § 3506(c)(10(C)).

Advance public notice will give the public a greater opportunity to monitor and participate in agency decisions affecting information services and products. Experience has shown that, when consulted, the public can make meaningful contributions to the development of efficient and effective public information services and products.

B. Proposed Additions To S. 1742

The IIA believes that S. 1742 could be improved by additional provisions to strengthen and enhance the information dissemination objectives of S. 1742. Although we believe that implicit support for some of these objectives can be found in the language of S. 1742, we would urge the Committee to consider making these objectives explicit.[4/]

1. In disseminating information, the agency should ensure that no party -- public or private -- has the ability to exercise monopolistic control.

Monopolistic control of government information, regardless of who exercises such control, is not in the public interest and must be prohibited. By definition, monopoly control of information denies the diversity of information sources essential to preserving a free flow of ideas. Moreover, monopoly control of government information will deny citizens

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[4/] The Committee may want to examine some of the compromise language in the government information dissemination provisions of legislation now pending in the House of Representatives, H.R. 3695. These provisions of H.R. 3695 were the subject of lengthy negotiations in which IIA participated, and have the support of substantial segments of the information community including IIA and various public interest groups.

the innovative new products and lower prices that can only come from a competitive marketplace.

S. 1742 already protects against monopolistic conduct arising out of discriminatory or unequal access to government information. Monopolistic conduct, however, can also arise when agencies defer excessively to their contractors or restrict the public's ability to use the information. We believe S 1742 should address these types of monopolistic conduct.

In addition, we believe that S. 1742 should prohibit restrictions such as the use of royalty type charges unless permitted by statute. This would also reinforce the longstanding policy expressed in the Copyright Act, prohibiting the Federal government from asserting copyright in government works.

We suggest that the Committee address these other types of monopolistic conduct by adding language to S. 1742 prohibiting agencies, unless specifically provided for by statute, from:

- establishing an exclusive, restricted, or other distribution arrangement that interferes with timely or equal availability of public information to the public;

- restricting or regulating the use, resale, or redissemination of public information products or services by the public; and
- charging fees or royalties for resale or redissemination of public information.

2. Agency decisions to create, change, or eliminate products and services should be made through a process which is fully exposed to public view and in which the public may participate. Agency notices should include an explanation of the benefits and general costs that will result from their action.

Although S. 1742 requires agencies to provide advance notice to the public of significant actions concerning significant public information products and services, it is silent on the content of the notice and on the public's ability to participate.

To be complete and meaningful, an agency's notice should advise the public of the benefits that the agency intends to achieve by its action. A discussion of the reasons for a proposed action should include, but not be limited to, consideration of the factors listed in proposed section 3504(h)(3)(E), Title 44, United States Code. *See* S. 1742 § 104(e). In cases of new products, this "benefits analysis" typically would describe the usefulness of the new or modified product or service, identify the public needs that it is serving, and whether or not it duplicates existing governmental or non-governmental products or services. This will allow for a more meaningful evaluation of the product or service. In addition, the agency should disclose any cost-effectiveness data that it can so that the overall costs of the proposed program can be considered in relation to its benefits. This will permit an examination of how best to conserve and utilize public funds.

Having notified the public of its proposed actions, agencies should also provide the public with a meaningful opportunity to participate, and thereby to contribute to the improvement of public information services and products.

We suggest that the Committee address these issues by adding language to S. 1742 requiring agencies to:

- make available to the public a description of the proposed action and a detailed explanation of the reasons for the action; and
- accept and consider public comments on the proposed action.

The public should have a right to participate in decisions about the dissemination of public information. The inclusion of these provisions will serve as a safeguard against inappropriate government decisions.

3. User fees for government information products should not exceed the marginal cost of providing copies of the information.

There exists unnecessary confusion regarding an agency's ability to recover through user fees the cost of developing an information product. According to the General Accounting Office, the Freedom of Information Act, 5 U.S.C. § 552, and the User Charge Law, 31 U.S.C. § 9701, bar an agency furnishing information to the public from charging user fees that exceed the cost of providing a copy of the information. See GAO, ADP Acquisition: SEC Needs To Resolve Key Issues Before Proceeding With Its EDGAR System, pp. 25-27 (GAO/IMTEC-87-2, Oct. 1986). Agencies incur the expense of creating information and operating information systems to fulfill statutory and programmatic requirements. Consequently, user fees should not reflect agency overhead or the costs of information creation, but should be limited to the transaction costs associated with the information's reproduction and dissemination.

Yet agencies sometimes anticipate generating revenue through higher user fees for information products. Higher user fees, however, distort the incentives for Federal agency managers. The government should not be offering an information product just to meet a market demand. Failure to limit the price of government information products may lead to agencies offering such products merely because they are revenue producers and without regard to whether they serve the public.

Finally, recovering the cost of operating an information system through non-appropriated funds limits Congressional oversight and diminishes agency accountability to elected representatives. Thus, market-based pricing for government information products and services could make agencies less accountable to the public about the manner in which they make available government information.

S. 1742 is silent on this issue. We suggest that the Committee address it by adding language to S. 1742 prohibiting agencies from:

> establishing user fees for public information products that exceed the marginal cost of dissemination.

4. Federal agencies should disseminate information in usable electronic formats.

The government should assure that its electronic data bases are available to the public, including access to the underlying information. Moreover, the government, to the extent practicable, should make available software, indexes, and documentation that it has itself developed. Agencies need not create software and other materials exclusively for use by the public, but they should make them publicly available if developed for agency use.

S. 1742 should be amplified on this issue by requiring agencies:

> to the greatest extent practicable, to disseminate in usable electronic formats (in whole and in part, and along with available software, indexes, and documentation) public information maintained in electronic formats.

REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT

We have confined our comments to the information dissemination provisions of S. 1742. However, we wish to note that the IIA supports the reauthorization of the entire Paperwork Reduction Act. Originally enacted to reduce the burdens of government activities on the public and improve the management of government information, the Paperwork Reduction Act is even more important today than it was in 1980.

CONCLUSION

The debate over government information dissemination policy has progressed significantly in the past few years. The IIA's own position has evolved and matured. A few years ago a consensus in support of specific legislation might not have been possible. But today we join with other segments of the information community in support of the information dissemination provisions of S. 1742, the Federal Information Resources Management Act. It is time for Congress to enunciate the rules on these issues which are so important to our nation economically, politically, and socially.

We also urge the Committee to add language to S. 1742 making explicit information dissemination objectives that in many cases are already implicit in the bill. Inclusion of these objectives in S. 1742 will ensure wider dissemination of public information.

As I indicated earlier, S. 1742 is a compromise. If the substantive goals of S. 1742 are significantly changed, then there are additional issues that the IIA would suggest to be considered. However, we do hope that the goals of S. 1742 remain intact and that no significant changes are necessary. We therefore urge favorable action by this Committee and the Congress.

Mr. Chairman, we appreciate the opportunity to present this testimony, and look forward to working with you and the other members of this Committee on this important legislation.

TESTIMONY

OF

JERRY J. BERMAN

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

ON

FEDERAL INFORMATION DISSEMINATION POLICY REFORM

AND THE

FEDERAL INFORMATION RESOURCES MANAGEMENT ACT OF 1989

BEFORE THE

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

FEBRUARY 22, 1990

Mr. Chairman and Members of the Committee:

On behalf of the American Civil Liberties Union, I want to thank you for the opportunity to testify on the public information dissemination sections of S. 1742, "the Federal Information Management Act of 1989." As you know, the American Civil Liberties Union is a non-partisan organization of over 270,000 members dedicated to the defense of civil liberties guaranteed by the Constitution and the laws of the United States.[*]

Overview

Mr. Chairman, as an organization committed to the public's right to know and the free flow of government information, we strongly support the dissemination sections of S. 1742 and join with other public interest groups and the Information Industry Association in urging that they be enacted into law.

S. 1742 would establish federal information dissemination policy for the new era of electronic public information. It's provisions are based on the recognition that since the enactment of the Paperwork Reduction Act of 1980, revolutionary change, brought about by new information technologies has altered both the way in which the government disseminates information and the way citizens may use it.

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[*]. Mr. Berman, testifying on behalf of the American Civil Liberties Union, is Director of the ACLU Project on Information Technology and Civil Liberties. He is also a fellow at the Benton Foundation, a non-profit educational foundation focusing on the democratic potential of communications and computer technology. The views expressed today do not represent those of the Benton Foundation.

Whatever controversies surround the Paperwork Reduction Act and its need for overall reform, there is broad consensus that we need new federal information dissemination policy to deal with this transformation. In the last year, the Office of Technology Assessment,[2] the Administrative Conference of the United States,[3] library association and public interest groups,[4] as well as the Information Industry Association, [5] have all called for information policy reforms that address the dissemination of public information using new technologies. The Office of Management and Budget's Office of Information and Regulatory Affairs, which establishes government-wide information policy, has itself testified before your Subcommittee on Government Information and Regulation that its current information dissemination policy is "obsolete."[6]

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[2] Office of Technology Assessment, Informing the Nation:Federal Information Dissemination in an Electronic Age (October 1988)

[3] Administrative Conference of the United States, Recommendation 88-10: Federal Agency Use of Computers in Acquiring and Releasing Information (Adopted December 8-9, 1988) 1 CFR Sec. 305.88-10. See Perrit, Henry H.Jr., Electronic Acquisition and Release of Federal Agency Information (Administrative Conference October 1988)

[4] Letter to J. Timothy Sprehe, Office of Information and Regulatory Affairs OMB from more than 40 organizations and individuals calling for the withdrawal of OMB's Advance Notice of Further Policy Development of Information published in the Federal Register on January 4, 1989 (Vol. 54 Fed. Reg. 214) and for OMB to initiate a comprehensive review and revision of Circular A-130 which governs federal information resource management today. Available from OMB Watch, 1731 Conn. Ave. N.W. Washington, D.C. 20009-1146. See Testimony of Gary Bass, Executive Director OMB Watch before this Committee, Feb. 21, 1990.

[5]. Testimony of Ken Allen on Federal Electronic Dissemination Policies on behalf of the Information Industry Association before the Subcommittee on Government Information Justice and Agriculture on April 18, 1989.

The Need for Reform

The public interest case for policy reform can be briefly stated.

Today, the government increasingly disseminates public information through government and commercial database services, on CD Rom Disks, and by other electronic means. Now, the "PC Revolution" has given citizens the potential ability to acquire, store, use, and manipulate electronic public information both to learn about government and to hold it accountable.

This information revolution should enhance the public's "right to know." However, there are few examples of the federal government using information technology imaginatively to serve democratic ends.[7] As I have documented in more detail elsewhere, this is a direct consequence of current federal electronic dissemination policy established pursuant to the Paperwork Reduction Act of 1980 -- legislation enacted prior to the "PC Revolution" and which encompasses different goals than expanding public access to government information in general or electronic information in particular.[8]

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[6] Markoff, John, "OMB Proposes Switch in Information Policy," New York Times (June 10, 1989). See OMB Second Advance Notice of Further Policy Development on Dissemination of Information, June 9, 1989. See testimony of S. Jay Plager before the Senate Government Affairs Subcommittee on Government Information and Regulation, June 16, 1989.

[7]. In 1986 the Congress passed the Superfund Reauthorization which included the first electronic "right to know" statute. Under Title III, the Environmental Protection Agency is required to make information about toxic releases in the environment available to the public electronically at reasonable cost or under a fee waiver or reduced fee policy when it serves the public interest. EPA, environmental, and right to know organizations are now working to make this database function as a tool of citizen empowerment in the era of electronic information.

The Paperwork Reduction Act mandates that OMB develop "uniform and consistent information management policies" and creates an Office of Information and Regulatory Affairs (OIRA) within OMB to develop such a policy. However, the clear and overriding objective of information management under the Act is to reduce the government costs and burdens of federal "paperwork."

While the Paperwork Reduction Act encourages government automation and computerization, the Act explicitly states that automation is a means for making government information functions less costly and more efficient rather than a means for maximizing public access to information.[9] Although Congress amended the Act in 1986 to include "dissemination" of information as a function of automation, the purpose was principally to achieve efficiency and cost savings.

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[8]. See Berman, Jerry, "The Right to Know: Public Access to Electronic Information," in New Directions in Telecommunications Policy Volume II, Newburg, Paula ed., (Duke University Press 1988).

[9] The legislative history of the Paperwork Reduction Act states that government information resource management should maximize public access to information but access goals are nowhere set forth in the statute or considered in the context of federal electronic information dissemination.

In 1985, OMB's Office of Information and Regulatory Affairs issued Circular A-130 to establish information management policy pursuant to the Act. While the Circular recognizes the value of public information and states that the "right to access government information must be protected...", its underlying assumption is that citizens access rights are satisfied if they have access to published information.[10] Electronic public information and its dissemination are treated as a secondary form of discretionary government information which may only be employed by agencies if it achieves cost savings and efficiency. Thus, it is not cost effective if a similar product is available from private sector firms and it is quite appropriate, "where the information is already substantially available in printed form," to consider "dissemination in electronic form to be a service of special benefit the costs of which should be recovered through user charges."

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[10] This is also based on a narrow and actively contested interpretation of the Freedom of Information Act. In 1974, the Freedom of Information Act was significantly revised, but again before the "PC revolution." The legislative history establishes that the FOIA encompasses records stored in computer files. However, it did not explicitly state that citizens had a statutory right to the electronic as well as the published version of the requested information or that the government would be required to program or reprogram all databases to ensure public access to both the electronic and published versions of specific government information. As a consequence, specific government agencies have tried to use the uncertain status of electronic data under the FOIA to contend that citizens must pay additional costs for accessing electronic information which would otherwise be subject to fee waivers (because of reprogramming) or argue that they are under no legal obligation to provide the electronic version of public information. Even if this interpretation is wrong, the FOIA imposes no obligation on the part of federal agencies to disseminate public information electronically. See Berman, Jerry, "The Right to Know:Public Access to Electronic Public Information," Supra. See also Testimony of National Security Archive before the House Subcommittee on Government Information Justice and Agriculture, May 23, 1989. While beyond the scope of this testimony, it is important to note that this interpretation of FOIA is also having an adverse impact on the public's right to know in the electronic age.

This, in effect, amounts to a public policy which encourages the development of electronic dissemination systems by the government or private sector but structured in a way which may be detrimental to public access to electronic data. But since the policy assumes that public access rights are satisfied if citizens can obtain the published version of the information, such discontinuities are of little import. Under this policy, the federal government

> --is discouraged from duplicating a private sector information service of important government data even if it is priced beyond the means of public users to afford;
>
> --has no writ to develop subsidy programs to reduce or waive fees to make government or commercially available government electronic databases accessible to citizens who cannot afford market rates to use them when it serves the public interest;
>
> --permits the development of electronic government dissemination systems only when commercially viable, which results in databases skewed towards business and regulatory affairs where private vendors can profit from selling government data;
>
> --does not fund the development of critical health, education, welfare, and environmental databases where market considerations deter private vendor development of electronic databases; and
>
> --does not even provide a complete index of government databases or information to direct citizens to their use.

The Reforms of S. 1742

Mr. Chairman, we believe that, if enacted, S. 1742 would establish far-reaching and significant federal information dissemination policy. While federal information policy would still be designed to achieve the laudable goal of minimizing the Federal paperwork burden, Section 101 states that federal policies would also seek to "ensure the greatest possible public benefit from information collected...[and]...disseminated by the Federal government." (Section 101).

Strengthen Public Access

Pursuant to Section 104, the Office of Management and Budget (OMB), acting through an Office of Information and Regulatory Affairs (OIRA), would continue to develop federal information dissemination policy guidance. However, unlike current law and regulations (e.g. Circular A-130), the OIRA Administrator would be required to develop policy guidance to "strengthen" public access to government information in both printed and electronic formats. OMB would be required to maximize public access by developing guidance to make "public information products and services available on timely, equitable and equal basis to all persons." Significantly, Section 106 imposes additional obligations on each federal agency to develop information systems, processes, and procedures that "maximize the usefulness and timely release of Government agencies to all users" and "ensure that the public has "equitable, and equal

access to...[an] agency's public information products and services."

Affirmative Government Role/ Proper Private Sector Role

In contrast with current law, federal agencies,pursuant to S. 1742, would not defer to the private sector in developing public information dissemination products and services. Section 104 requires OMB to develop guidance to "maintain an **affirmative** role for Federal agencies in the dissemination of Government information..." **The statute strike a proper balance between** public and private sector roles by requiring OMB to achieve public access goals by maintaining an affirmative government role while "encouraging a diversity of public and private information products and services" and a "sharing of responsibility for information dissemination."

Section 104 contains a clear articulation of this balance between public and private sector roles in achieving public information dissemination goals. Pursuant to Section 104 (3) (E), when a federal agency seeks to determine how to fulfill its public information dissemination functions, it only has to consider

> "(iv) if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service..."

Under current law and practice, if a public information product would in any way duplicate or mirror a private sector information product, an agency is required to defer to the private sector product. Under section 104(3) (E) (iv), a private sector product would not be equivalent if it failed to achieve "agency dissemination goals" which could encompass factors ranging from product design to price. Moreover, as we understand the intent of the drafters that would be articulated in legislative history, an agency, if it chose, could proceed to develop a product even if an equivalent private sector product would meet agency goals. Of course, the legislative history would urge agencies not to waste resources on duplicative products but to marshall resources to maximize public access to information.[11]

The Need for Specificity

While we support the articulation of federal dissemination goals in section 104, we urge the Committee to add the specific dissemination requirements and prohibitions set forth in Section 103 (c) of H.R. 3695, the "Paperwork Reduction and Federal

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[11]. Some criticize this section as a statutory embodiment of "privatization", that is a policy of permitting the private sector to perform a public function, here public information dissemination. In our view, this is a misuse of the concept of "privatization." The section does not turn over this public function to the private sector. The federal government maintains overall responsibility for insuring that federal information dissemination objectives are met. The above section recognizes that the government will be an information provider, even in circumstances where private information products are equivalent and certainly when they are not. If the critics are articulating a policy option that the government should be the exclusive publisher of all public government information, it is a policy we oppose because of our basic commitment to diversity and the free flow of information which results from diversity.

Information Resources Management Act of 1989" pending before the House. We know of no opposition to these provisions and believe they are fully consistent with the terms of S. 1742. These include provisions that would:

--require agencies, "to the greatest extent practicable to disseminate in usable electronic formats (in whole and in part, and along with available software, indexes, and documentation) public information maintained in electronic formats;"

--spell out more specific notice requirements for initiating, terminating, or significantly modifying a public information product or service;

--permit an agency "to reduce or waive any user fees for disseminating public information when the agency determines that the dissemination may enhance an agency mission;" and

--prohibit agencies from entering into exclusive contracts for information products or services, charging fees or royalties for public information, establishing user fees that exceed the marginal cost of dissemination, and new sales programs without notice to the Public Printer.

Other Important Reforms

Mr. Chairman, we also endorse other provisions in the statute designed to reform federal information dissemination policy and practice. We support provisions of the Act designed to improve public access to electronic information through the federal depository library program. We also support section 110, calling on the Administrator of OIRA to report on the "feasibility and means of establishing a comprehensive inventory and authoritative register of all information dissemination products and services," and the establishment of broadly representative advisory committees. Finally, we believe the creation, pursuant to Title II, of a Commission on Federal Information is long overdue.

Shared Concerns

Mr. Chairman, In endorsing the dissemination provisions of S. 1742, we must state that we also share some of the reservations of library groups about enhancing OMB's information dissemination policy role. In view of OMB's record of reducing the dissemination of government information federal over the course of the Reagan Administration, there is considerable reason for caution and concern.

However, we cannot ignore the fact that the Office of Management and Budget currently has great power over information management and governs under an outdated Paperwork Reduction Act and implementing guidelines---OMB Circular a-130---which diminish public access to information. Unless Congress redirects OMB policy, those outmoded policies will continue to remain in effect and any changes in policy---including OMB's establishment of an affirmative information dissemination policy---will continue to be discretionary. This is intolerable and must be changed.

In the absence of any viable alternative scheme,[12] we strongly believe that S. 1742, with appropriate amendments, should be enacted into law.

Conclusion

Mr. Chairman, we want to applaud you, Senator Bingaman, and others on the Committee for helping to craft this significant legislation. We hope to continue to work with the Committee, its excellent, staff, and others in the Congress and in the private sector to see this legislation to passage. Thank You.

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[12]. Some have suggested revising Title 44 to restore and enhance the information functions of the GPO and Joint Committee on Printing. Giving a congressional entity a legislative veto over executive agency information dissemination policy and decision making poses significant constitutional problems under Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983). In addition, this, and any scheme which proposes that the Congress exercise authority now vested in the executive branch faces significant political hurdles. Either Congress must persuade the President to delegate his authority or overcome his objection by overriding a veto, and prevailing in any constitutional challenge in the courts.

Statement of

Patricia Wilson Berger, President
American Library Association

on behalf of the
American Library Association

before the
Senate Committee on Governmental Affairs

on
S. 1742, the "Federal Information Resources Management Act of 1989"

February 22, 1990

I am Patricia Wilson Berger, president of the American Library Association, a nonprofit educational organization of 50,000 librarians, library trustees, and friends of libraries dedicated to the improvement of library and information services for all people. ALA's members direct and operate all types of libraries: public, school, academic, as well as special libraries in governments, scientific institutions, businesses, industries, and the arts. ALA promotes government policies that ensure equitable and ready access to government information.

Thank you for the opportunity to comment on S. 1742, the "Federal Information Resources Management Act of 1989," a bill that reauthorizes the Paperwork Reduction Act (PRA). Once passed, this legislation sets a major component of information policy for the next decade and into the next century. We believe that how the PRA is reauthorized will determine whether or not the citizens of this country enjoy ready, equitable access to government information, as well as how well librarians can assure such access for U. S. citizens.

The status of future public access to government information is now at a crucial point, due in no small measure to changes in and developments of new technologies. For as long as information consisted of symbols on paper, the nature of access was clear: someone had only to get a copy of the relevant document. Now that an increasing portion of government information exists only in electronic and computerized form, it is a far greater challenge to ensure future public access.

While S. 1742 covers a wide range of issues, including regulatory review, statistical policy and paperwork clearance, ALA's concerns focus primarily on the dissemination sections of the bill.

My testimony covers five topics that I would like to bring to the attention of this Committee. These include:

- Two principles which we believe should frame the Paperwork Reduction Act reauthorization debate;
- The nature of the partnership between libraries and governments at all levels;
- The library community's concerns regarding the role of the Office of Management and Budget (OMB) as it relates to reauthorization of the Paperwork Reduction Act;
- Dangers of privatizing government information; and
- Recommendations regarding needed changes to S. 1742.

Principles Which Should Undergird Reauthorization of the Paperwork Reduction Act

We would like to see two broad principles incorporated in the law:

- First, that the federal government has an affirmative obligation to disseminate government information to the public regardless of its format, and at a reasonable cost.

- Second, that access to government information is the public's right and, therefore, should drive the objectives and goals of all government information policy. Thus, electronic information dissemination systems must also serve to inform the public, and should enhance the public's ability to access government information as well.

At ALA's Midwinter Meeting in January of this year, reauthorization of the Paperwork Reduction Act was widely debated and resulted in the passage of a Resolution by the Association's Council, its policy-making body. A copy of that Resolution is attached to this statement. The Resolution urges the sponsors of both S. 1742 and its House counterpart, HR 3695, to amend these bills in ways we believe are necessary to ensure the public's right to equal and ready access to government information.

We are pleased that the purposes of S. 1742 include "to ensure the greatest possible public benefit from information collected, maintained, used, disseminated, and retained by the Federal government," and to "improve the accountability of the Office of Management and Budget and all Federal agencies to Congress and the public." ALA supports the need to incorporate into statute measures to ensure equitable dissemination of government information in electronic formats. While we applaud the bill's requirement that agencies provide their publications for distribution to the nearly 1,400 Depository Libraries throughout the United States, we request that language be added to S. 1742 that requires agencies to provide their publications in electronic formats for distribution to U. S. Depository Libraries.

We also support the two-year reauthorization requirement in the bill. This time frame should allow for the kind of close Congressional oversight that this important statute demands.

However, we have serious concerns about those elements of the bill which would expand the authority of the Office of Management and Budget over federal agency dissemination decisions. We are also concerned about those provisions that we believe could restrict public dissemination of government information and could privatize much of it as well.

The Role of Libraries in the Dissemination of Government Information

Information about the government's policies, programs, and actions is crucial to citizens in a democracy who are obliged to make informed judgments about public policy. Since the earliest days of the Republic, the federal government has provided ways to inform the public of its activities and to collect information essential to its operations. Today, it is the largest collector and publisher of information in the United States. Since the 19th century, libraries have served as partners to the government in disseminating federal information. The nearly 1,400 libraries in the Government Printing

Office's Depository Library Program serve as host institutions for disseminating government information to citizens throughout the country, in every Congressional district.

Until recently, most of the publications provided by the Depositories have been in paper and microform formats. Many of these libraries are equipped and prepared today to disseminate government information in other formats, including electronic formats. Indeed, throughout the past 20 years, libraries have pioneered in applications of the new information technologies.

While new technologies have the potential to increase public access to information, they are equally capable of erecting artificial barriers to citizens' right to know. Among those barriers are fees, and lack of equipment, software, indexes, finding aids, training, and expertise in the use of databases. Libraries can lower or even eliminate such barriers. The federal government must assure that citizens enjoy ready, equal access to information, regardless of format; information that stimulates economic, educational, scientific and technical growth, as well as information which increases citizens' awareness of the activities of their government. Government information reaching the Depository Libraries must include information in electronic format; otherwise, the Depository Libraries will cease to function as cost-effective disseminators of government information.

The 1988 Office of Technology Assessment report, "Informing the Nation," concluded that information technologies hold the promise of helping to achieve the original goals and intent of the Depository Library Program by enhancing the public's access to government information. Because the government is changing the way in which it communicates with the public, we request that S. 1742 be amended to add the phrase "including government publications in electronic formats"; to the end of line 6 on page 24 of the bill.

The Office of Management and Budget

The library community has concerns about the Office of Management and Budget's past interpretations and implementation of the Paperwork Reduction Act. For example, OMB has tried on several occasions to privatize both the publication and the dissemination of government information and to eliminate those publications they regarded as unnecessary. Since 1982, OMB has forced the elimination or consolidation of 25 percent of all agency publications. In addition, substantive information functions of every agency and department have been targets of budget cuts.

In fact, OMB is cutting its own delivery of vital data. In a January 22 editorial, "Secrecy," Government Computer News expressed its surprise and concern at OMB's announcement that it no longer will publish several special analyses as supplements to the annual federal budget and will not publish the popular management report that gave a great amount of detail on the government's plans for use of information technology. The editorial said the information in the special analyses and management report is not available anywhere else, calling OMB's decision "a terrible decision and a worse trend."

Through its Office of Information and Regulatory Affairs (OIRA), OMB has cut back on information collected by federal agencies. For example, in 1987 OIRA and the Bureau of the Census struggled over questions OMB wanted deleted from the 1990 decennial census test. These questions related to housing, energy, transportation, unemployment, fertility, and population mobility. Failure to gather this data means that we will not have the necessary information the nation needs to tackle many of the important and pressing issues and questions we face.

For the record, let me say that ALA appreciates OMB's recent openness and willingness to meet and exchange views with librarians and other members of the public-interest community. We are particularly encouraged by OMB's withdrawal of its controversial January 4, 1989, proposal to amend Circular A-130, "Management of Federal Information Resources." More than 200 letters of comment on the January notice were received; two thirds of these were from librarians. Most of the letters expressed concern about the bias toward the private sector as well as the minimization of federal agency responsibility for information dissemination. Recently, OMB indicated that it is holding up its promised revision of Circular A-130 pending reauthorization of the Paperwork Reduction Act. ALA believes that the new legislation should limit the OMB's role in the formulation of information dissemination policy, emphasizing instead the responsibility of each agency to perform this function and to make the decisions concerning this function.

While the text of the bill relating to paperwork reduction and information collection provides a means to restrain OMB's authority to usurp agency decisions or to operate in secret, similar limitations on OMB have not been included in the section of S. 1742 which deals with the information dissemination functions of the Administrator of the Office of Information and Regulatory Affairs (pages 16-19). Instead, this section could substantially increase OMB's authority over the dissemination of government information--authority that, in the past, Congress has chosen either to reserve for itself, or to legislate to specific agencies on a case-by-case basis. This section consolidates two components of control in a single agency, namely the authority to regulate government information dissemination and the authority to wield budgetary control over such information. ALA does not believe that any useful purpose is served by such sweeping investiture of expanded authority in OMB. We ask that Congress not forget that OMB has used its present limited PRA authority to force sharp curtailment of the flow of government information and to mandate increases in the prices the public must pay for that access.

In some ways, the bill elevates the regulatory authority OMB currently exercises to statutory authority. We do not believe that Congress should delegate its oversight of government information dissemination because given OMB's track record over the past decade, we question whether the constraints in S. 1782 are sufficient to assure equitable, affordable public access.

ALA urges Congress to retain its overall information dissemination authority and to strengthen its oversight responsibility. Further, Congress should ensure that responsibility for implementing government information policies remains within each federal agency. Consistent with the provisions of S. 1742 (page 18, lines 7-9) that OMB guidance should "reflect that the head of each agency has the primary responsibility for management of Federal information resources," ALA is prepared to offer the Committee legislative language that we believe meets that goal.

If final decision-making authority is shifted to or remains with individual agencies, as ALA recommends, then each agency should be made accountable to the public through legislative provisions that establish a petition-for-review procedure along with the right of interested parties to seek judicial review after exhausting internal agency appeal procedures.

An alternative means to limit authority over information policy would be to subject all proposed new OMB information policies to the enactment of enabling legislation. In such circumstances, the burden would rest with OMB to justify its proposals to Congress. Thus, Congress would continue to determine the appropriate balance of public and private providers of government information.

Dangers of Privatizing Government Information

ALA urges Congress to reaffirm the obligations of government to disseminate its information. Throughout the 1980s, the prevailing view of the executive branch was that government should refrain from any activity that can be done by the private sector. Thus far in 1990, this thinking has not changed. Indeed, in recent years it has been applied to both government information products and services, and to providers.

As written, section 104(e) seems to approve of those OMB policies which preclude the reasoned agency decision making S. 1742 seeks elsewhere to encourage. Subsection (3)(E) on pages 18-19 would require an agency to consider six factors in determining how to satisfy its public information dissemination responsibilities, including consideration of "equivalent" information products or services available from other public or private sources. This subsection could enhance OMB's use of reporting requirements to delay or to block agency initiatives. Moreover, this subsection would provide OMB with the legal basis for rendering agency experiments with new information technologies difficult, if not impossible, to undertake.

For instance, the government maintains electronic bulletin boards to communicate among and between agencies and the public. Such communication should not be impeded or curtailed just because bulletin boards are available from other public or private sources. Unfortunately, precisely such curtailment could be construed under the subsection as presently worded. Commenting on a similar stipulation in OMB's proposed January 1989 revisions to Circular A-130, one writer noted that had such caveats been in place 20 years ago, OMB's predecessor agency could have prohibited agency experiments with reprography--nor could agencies have entered into the kinds of joint ventures with the private sector which led to the development of the paradigm commercial database systems we know today as Dialog and ORBIT. ALA urges that this list of factors be eliminated.

The apparent bias toward the privatization of government information in this subsection is extremely troubling, because it could legislate a larger role for the private sector in the dissemination of government information for profit--information for which the American taxpayer has already paid. A system of information "haves and have-nots" could be created: Big-business customers can afford to buy, while students, individuals, libraries, and others cannot. Moreover, in most instances, privatization of a government information product or service results in that information ceasing to be made available to the public through the Depository Library Program.

While we know that private firms can and do play necessary ancillary roles in the production and dissemination of government information, those roles must never eclipse the affirmative obligation of the government to disseminate information directly to the public. Except when a private firm is under contract to a government agency, the private sector is under no statutory obligation to disseminate the government's information. Nor is the private sector obliged to continue dissemination of a product or service it no longer considers viable or profitable, no matter what its importance to U. S. citizens. Equally serious, as more and more private-sector firms come under the control of foreign-owned conglomerates, primary reliance on the private sector for public access to government information becomes questionable and potentially dangerous.

For example, in a recent article in the library press, Patricia Glass Schuman, who is President of Neal-Schuman Publishers and Chair of ALA's Legislation Committee, documents what she considers the danger of a publishing monopoly and the trend toward foreign control of American publishing companies. Schuman notes that in 1958, 72 percent of all books were sold by independent one-store firms; but today, 52 percent are sold by four large bookstore chains. Five commercial database vendors account for more than 90 percent of the sales and uses of database services. Once an industry made up of independent, family-run companies, trade book publishing is now dominated by just six corporations. Further, many of the large information conglomerates cross national boundaries and owe allegiance to no nation. For example, Maxwell Communications Corporation of London owns BRS, ORBIT, Infoline, ORBIT Search Services, Pergamon Financial Data Services and, of course, Macmillan and other publishing companies.

In addition, Elsevier North Holland counts among its holdings Excerpta Medica, Congressional Information Service, and Greenwood Press. Elsevier has lobbied for years against the National Library of Medicine's Index Medicus and Medlars/Medline databases, calling them "unfair" competition because they are subsidized by the U. S. government. Finally, such "U. S." companies as Aspen Systems; Warren, Gorham, and Lamont; Clark Boardman; Auerbach Publishers; Wadsworth; Van Nostrand Reinhold; Gale Research; Bowker; Carrolton Press; and Information Handling Services are now controlled by foreign corporations.

Do we really want the dissemination of the federal government's information held hostage to someone's bottom line, especially if that someone owes no allegiance to the United States?

ALA's Recommendations

ALA urges the following amendments to S. 1742:

- Retain in Congress overall information dissemination authority and strengthen Congressional oversight responsibility of information policy issues and actions;
- Ensure that responsibility for implementing government information policies remains within the federal agencies;
- Insist that public access to government information in electronic format be provided through the Depository Libraries;

- Require that federal agencies disseminate all government information to the public, complete with the appropriate software, indexes, and documentation needed to facilitate its usefulness;

- Eliminate the list of restraining factors in S. 1742 [subsec. (3)(E), pages 18-19] an agency must consider in determining how to discharge its information dissemination responsibilities;

- Grant interested parties the right to petition agencies for review of significant changes in information dissemination policy, using the model provided in the Solid Waste Disposal Act, 42 U.S.C. 7004;

- Assure that public notice of agency plans to change dissemination policies receive not only notice, but also public review prior to any review of those policies by the Office of Management and Budget.

We have developed specific legislative language to achieve these goals and would be pleased to discuss this with the Committee staff before you mark up S. 1742. Thank you for the opportunity to share our views with you today.

ATTACHMENT

RESOLUTION ON REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT

WHEREAS, The American Library Association has long held that the federal government has an affirmative obligation and responsibility to disseminate government information, regardless of format, to the public; and

WHEREAS, Access to government information is a public right and a principal function and goal of the federal government; and

WHEREAS, Attempts to reduce the paperwork burden on the public should not result in diminished access to government information; and

WHEREAS, The Paperwork Reduction Act (PRA) as implemented by the Office of Management and Budget (OMB) has resulted in less government information and less public access to government information; and

WHEREAS, OMB has interpreted PRA to encourage privatization of federal information products and services to the detriment of public access to government information; and

WHEREAS, Congress is now considering PRA reauthorization legislation (HR 3695, S. 1742) which is the result of Congressional dissatisfaction with OMB's past efforts to restrict collection and dissemination of federal information and to interfere with agency regulatory functions; and

WHEREAS, ALA has recommended revisions to these bills to ensure equal and ready access to government information; and

WHEREAS, Portions of the proposed legislation do promote public access to government information; and

WHEREAS, The dissemination sections of the bills still contain provisions that would have long-term negative consequences to users of government information; and

WHEREAS, These provisions will significantly increase the role in government information dissemination policy of the OMB, restrict dissemination and privatize government information; now, therefore, be it

RESOLVED, That the American Library Association communicate to the sponsors of HR 3695 and S. 1742 and other members of Congress that these bills have good provisions including:

> recognizing the importance of public information and the government's responsibility to ensure the flow of information to the public;
>
> establishing the affirmative obligation of government agencies to disseminate information, regardless of format, and in ways which maximize its usefulness;
>
> requiring agencies to provide government publications for distribution through the Depository Library Program, including the House bill's provision for publications in electronic formats;

providing greater public accountability for OMB and agency decision making;

requiring agencies to utilize the Government Printing Office (GPO) for the production and dissemination of information products and services; and, be it further

RESOLVED, That the American Library Association urge the sponsors of HR 3695 and S. 1742 and other members of Congress, to amend these bills to include:

Retaining in Congress overall information dissemination authority and strengthening Congressional oversight responsibility;

Ensuring that responsibility for implementing government information policies remains with the head of each federal agency, rather than the OMB;

Guaranteeing that public access to electronic government information is provided through depository libraries;

Requiring federal agencies to disseminate government information to the public, regardless of format, complete with software, indexes and documentation needed to facilitate the usefulness and public access to government information;

Eliminating the list of restrictive factors (S. 1742, subsec. (3)(E), pp. 18-19, and HR 3695, subsec. (2)(E), pp. 12-13) required to be considered by an agency in determining how to carry out its public information dissemination functions. In particular, the fourth item on that list, requiring consideration of "equivalent" public or private information products or services, denigrates the role of the government agency and elevates the role of the private sector at the expense of the public;

Granting interested parties the right to petition agencies for review of significant changes in policy regarding information dissemination, such as that provided for in the Solid Waste Disposal Act, 42 U.S.C. 7004;

Assuring that public notice of agency plans to change dissemination policies precede any review by the OMB;

Limiting the reauthorization of the Paperwork Reduction Act to two years; and, be it further

RESOLVED, That copies of this resolution be transmitted to the appropriate Congressional committees and federal officials.

Adopted by the Council of the
American Library Association
Chicago, Illinois
January 10, 1990
(Council Document #60)

II

101st CONGRESS
1st Session

S. 1742

To further the goals of the Paperwork Reduction Act and provide for comprehensive information resources management of Federal departments and agencies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

October 6 (legislative day, September 18), 1989

Mr. Bingaman (for himself and Mr. Lieberman) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To further the goals of the Paperwork Reduction Act and provide for comprehensive information resources management of Federal departments and agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Information Resources Management Act of 1989".

SEC. 2. FINDINGS.

The Congress finds that—

★(Star Print)

(1) Federal information policy requires revision and updating;

(2) despite the significant effort to reduce paperwork burden, such burden has continued to increase;

(3) more needs to be done to reduce the paperwork burden on individuals, businesses, educational institutions, and State and local governments, particularly with respect to the burden associated with the Federal procurement and grant programs;

(4) the Office of Management and Budget must do more to fulfill its full range of information policy functions in order to meet the changing information needs of the Government and society;

(5) the information resources management concept is not well understood in Federal agencies, and the Office of Management and Budget needs to do more to promote this concept as a means of strengthening agency information management capabilities;

(6) coordination of Federal information policy depends on stronger leadership from the Congress and the executive branch; and

(7) the Office of Management and Budget review of Federal agency submissions requires less delay and more public accountability.

SEC. 3. TABLE OF CONTENTS.

The Contents of this Act are as follows:

Sec. 1. Short title.
Sec. 2. Findings.
Sec. 3. Table of contents.

TITLE I—INFORMATION RESOURCES MANAGEMENT OF FEDERAL DEPARTMENTS AND AGENCIES

Sec. 101. Purposes.
Sec. 102. Definitions.
Sec. 103. Office of Information and Regulatory Affairs.
Sec. 104. Authority and functions of the Administrator.
Sec. 105. Paperwork reduction goals and deadlines.
Sec. 106. Federal agency responsibilities.
Sec. 107. Approval and delegation of information collection; self-certification process.
Sec. 108. Federal Information Locator System.
Sec. 109. Review of agency activities; reporting; agency response.
Sec. 110. Responsiveness to Congress.
Sec. 111. Consultation and advisory committees.
Sec. 112. Public disclosure and reporting by the Office of Information and Regulatory Affairs.
Sec. 113. Authorization of appropriations.
Sec. 114. Technical and conforming amendments.

TITLE II—COMMISSION ON FEDERAL INFORMATION

Sec. 201. Findings.
Sec. 202. Establishment of the Commission.
Sec. 203. Functions of the Commission.
Sec. 204. Membership of the Commission.
Sec. 205. Travel expenses.
Sec. 206. Powers of the Commission.
Sec. 207. Cooperation with Federal agencies.
Sec. 208. Termination of the Commission.
Sec. 209. Authorization of appropriations.

TITLE III—MANAGEMENT OF PUBLIC RECORDS

Sec. 301. Binding regulations concerning public records.
Sec. 302. Reports on routine uses.

TITLE I—INFORMATION RESOURCES MANAGEMENT OF FEDERAL DEPARTMENTS AND AGENCIES

SEC. 101. PURPOSES.

Section 3501 of title 44, United States Code, is amended to read as follows:

"§ 3501. Purposes

"The purposes of this chapter are to—

"(1) ensure the greatest possible public benefit from information collected, maintained, used, disseminated, and retained by the Federal government;

"(2) minimize the Federal paperwork burden for individuals, businesses, educational institutions, State and local governments, and other persons;

"(3) emphasize Federal information resources management as a comprehensive and integrated process for improving the efficiency and effectiveness of Government information activities;

"(4) improve the quality and use of Federal information to strengthen decisionmaking, accountability, and efficiency in Government and society;

"(5) ensure that automatic data processing, telecommunications, and other information technologies are acquired and used to achieve all purposes of Federal information policy under chapter 35 of title 44, United States Code;

"(6) coordinate, integrate, and to the extent practicable and appropriate, make uniform Federal information policies and practices;

"(7) improve the accountability of the Office of Management and Budget and all Federal agencies to Congress and the public for the effective implementation of this chapter; and

"(8) ensure that the collection, maintenance, use, dissemination, and retention of information by the Federal Government is consistent with applicable laws, including laws relating to—

"(A) confidentiality of information, including section 552a of title 5, United States Code;

"(B) security of information including the Computer Security Act of 1987 (Public Law 100-235);

"(C) access to information, including section 552 of title 5, United States Code; and

"(D) collection, dissemination, and retaining of information, including title 44, United States Code.".

SEC. 102. DEFINITIONS.

Section 3502 of title 44, United States Code, is amended—

(1) by redesignating paragraphs (1) through (12) as paragraphs (2) through (13), respectively;

(2) by redesignating paragraphs (13) and (14) (as designated before the date of the enactment of this Act) as paragraphs (15) and (16), respectively;

(3) by redesignating paragraphs (15) through (17) (as designated before the date of the enactment of this Act) as paragraphs (19) through (21), respectively;

(4) by inserting before paragraph (2) (as redesignated by paragraph (1) of this section) the following new paragraph:

"(1) the term 'Administrator' means the Administrator of the Office of Information and Regulatory Affairs established under section 3503;";

(5) by amending paragraph (4) (as redesignated by paragraph (1) of this section) by inserting before the semicolon "including the resources expended for reviewing instructions, searching existing data sources, compiling and maintaining the necessary data, completing and reviewing the collection of information, and transmitting or otherwise disclosing the information involved";

(6) by inserting after paragraph (13) (as redesignated by paragraph (1) of this section) the following new paragraph:

"(14) the term 'information resources' includes—

"(A) data and information in any format;

"(B) individuals having information-related skills; and

"(C) related resources such as information technology;";

(7) by amending paragraphs (15) and (16) (as redesignated by paragraph (2) of this section) to read as follows:

"(15) the term 'information resources management' means the process—

"(A)(i) of defining in a systematic way the information needed to effectively accomplish the agency missions, goals, and objectives;

"(ii) of managing information resources to efficiently, economically, and equitably meet the defined information needs; and

"(iii) of integrating the skills of individuals in the various information resources management functions set forth in section 3504 of this title, in order to provide for the information needs of the agency in a reliable, accurate, complete, and timely manner; and

"(B) extends through the stages of collection or creation, processing, use, dissemination, and disposition of information by agencies and includes the management activities of planning, budgeting, organizing, directing, controlling, and evaluating the use of such resources, the training of personnel resources, and promoting the effective and efficient use of information resources;

"(16) the term 'information systems' means—

"(A) a collection of information developed or acquired and maintained through either manual or automated means to fulfill an agency's mission, goals, or objectives;

"(B) the processes, procedures, and personnel to obtain, maintain, use, and disseminate information; and

"(C) the related information technology resources;"; and

(8) by inserting before paragraph (19) (as redesignated by paragraph (3) of this section) the following new paragraphs:

"(17) the term 'information technology' means the hardware and software used in connection with Government information, regardless of the technology involved, including computers, telecommunications, micrographics, and automatic data processing equipment as defined under section 111(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(a));

"(18) the term 'major information system' means an information system that requires special continuing management attention because of such system's—

"(A) importance to an agency mission;

"(B) importance for public participation in the activities of Government consistent with agency mission;

"(C) high development, operating, or maintenance costs; or

"(D) significant impact on the administration of agency programs, finances, property, or other resources;".

SEC. 103. OFFICE OF INFORMATION AND REGULATORY AFFAIRS.

Section 3503 of title 44, United States Code, is amended by striking out subsection (b) and inserting in lieu thereof:

"(b) The Director of the Office of Management and Budget shall be responsible and accountable for all requirements, functions, activities, and expenditures under this chapter, and shall ensure coordination of the provisions of this chapter with other functions at the Office of Management and Budget.

"(c) There shall be at the head of the Office an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate. The Administrator shall be appointed with special attention to professional qualifications and credentials which may include education, work experience, or related professional activities required to administer the functions of the Office of Information and Regulatory Affairs described under this chapter.

"(d) In the preparation of the budget submitted by the President to the Congress under section 1105(a) of title 31, United States Code, in each fiscal year, the Office of Information and Regulatory Affairs shall be included as a separate line item within the budget of the Office of Management and Budget.".

SEC. 104. AUTHORITY AND FUNCTIONS OF THE ADMINISTRATOR.

(a) IN GENERAL.—Section 3504(a) of title 44, United States Code, is amended to read as follows:

"(a)(1) The Administrator is authorized to administer all functions under this chapter and shall report directly to the Director.

"(2) The Administrator shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of records, agency sharing and dissemination of information and acquisition and use of automatic data processing, telecommunications, and other information technology for managing information resources. The authority of the Administrator under this section shall be exercised consistent with applicable law.

"(3) The Administrator shall ensure that the Office of Information and Regulatory Affairs shall give balanced emphasis to all the functions under this chapter.

"(4) The Administrator shall ensure that the development of information policies, when appropriate, shall be coordinated with agencies with shared information management responsibilities under this chapter and other provisions of law.

"(5) The Administrator shall coordinate the development and implementation of information policy through the establishment of interagency working groups.

"(6) The Administrator shall ensure the development of formalized training programs on information resources management concepts by appropriate entities, for Government-wide use, and educate employees of the Office of Information and Regulatory Affairs on such concepts.

"(7)(A) The Administrator may initiate and conduct, with selected agencies and consenting non-Federal entities as appropriate, small-scale pilot projects and similar activities to test or demonstrate the feasibility and value of changes or innovations in Federal policies, rules, regulations and agency procedures to improve information practices and related activities.

"(B) The Administrator shall inform the President and the Congress of the findings and progress of such projects and activities.

"(C) All Federal agencies shall cooperate to the greatest extent allowed by law with the conduct of such projects and activities.".

(b) INFORMATION COLLECTION FUNCTIONS.—Section 3504(c) (5) and (6) of title 44, United States Code, are amended to read as follows:

"(5) promoting the reduction of burdens imposed through the collection of Federal information, with particular emphasis on those persons most heavily burdened, especially in the areas of Federal procurement and grant programs;

"(6) coordination with the Office of Federal Procurement Policy to address paperwork burdens associated with procurement and acquisition;".

(c) STATISTICAL POLICY AND COORDINATION FUNCTIONS.—Section 3504(d) of title 44, United States Code, is amended to read as follows:

"(d)(1) The statistical policy and coordination functions of the Administrator shall include—

"(A) coordinating and providing leadership for development of the Federal statistical system;

"(B) developing and periodically reviewing and, as necessary, revising long-range plans for the improved coordination and performance of the statistical activities and programs of the Federal Government;

"(C) ensuring the integrity, objectivity, impartiality, and confidentiality of the Federal statistical system;

"(D) reviewing budget proposals of agencies to ensure that the proposals are consistent with such long-range plans and developing a summary and analysis of the budget submitted by the President to the Congress for each fiscal year of the allocations for all statistical activities;

"(E) coordinating, through the review of budget proposals and as otherwise provided in this chapter, the functions of the Federal Government with respect to gathering, interpreting, and disseminating statistics and statistical information;

"(F) developing and implementing Government-wide policies, principles, standards, and guidelines concerning statistical collection procedures and methods, statistical data classification, statistical information presentation and dissemination, and such statistical data sources as may be required for the administration of Federal programs;

"(G) evaluating statistical program performance and agency compliance with Government-wide policies, principles, standards, and guidelines;

"(H) promoting the timely release of statistical data to the public;

"(I) coordinating the participation of the United States in international statistical activities, such as the development of comparable statistics;

"(J) preparing an annual report to submit to the Congress on the statistical policy and coordination function;

"(K) integrating the functions described in this paragraph with the other information resources management functions specified in this chapter; and

"(L) appointing a chief statistician who is a trained and experienced professional statistician to carry out the functions described in this paragraph.

"(2) The Administrator shall establish an interagency working group on statistical policy headed by a chief statistician to coordinate agency activities in carrying out the functions under paragraph (1), consisting of the heads of the agencies with major statistical programs.".

(d) PRIVACY FUNCTIONS.—Section 3504(f) of title 44, United States Code, is amended—

(1) in paragraph (2) by striking out "and" at the end thereof;

(2) in paragraph (3) by striking out the period and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following new paragraphs:

"(4) oversee the development of new information systems by Federal agencies containing personal information to ensure compliance with information policies, principles, standards, and guidelines, and existing information privacy laws;

"(5) conduct a periodic review of agency compliance, identify problems, and report the results to the Senate Committee on Governmental Affairs and the House Committee on Government Operations; and

"(6) recommend to the President for submission to the Congress legislative proposals to remove inconsistencies in laws and practices involving privacy, confidentiality, and disclosure of personal information.".

(e) INFORMATION DISSEMINATION FUNCTIONS OF THE ADMINISTRATOR.—Section 3504(h) of title 44, United States Code, is amended to read as follows:

"(h)(1) The information dissemination functions of the Administrator shall include the responsibility to—

"(A) develop policy guidelines, to be issued after notice and receipt of public comment, which shall enable Federal agencies to fulfill information dissemination functions and activities;

"(B) promote policy research and development in the area of information dissemination as a basis for developing effective guidance for program and policy development in the Federal agencies;

"(C) establish procedures for systematic oversight to ensure that the principles, purposes, and guidance expressed in this subsection are carried out; and

"(D) coordinate the identification of priorities for developing uniform technical standards.

"(2) In furthering the provisions of paragraph (1)(D)—

"(A) the National Institute of Standards and Technology shall, after consultation with the public and appropriate agencies, issue uniform technical standards; and

"(B) the Office of Management and Budget shall encourage the use of National Institute of Standards and Technology standards through its policy guidelines and assistance, and monitor the effectiveness of such standards.

"(3) Guidance issued by the Administrator under paragraph (1) shall—

"(A) be developed in consultation with central information management agencies possessing governmentwide dissemination authority under law;

"(B) strengthen public access to Government information, regardless of format, consistent with existing law including—

"(i) making public information products and services available on timely, equitable and equal basis to all persons; and

"(ii) encouraging a diversity of public and private information products and services;

"(C)(i) maintain an affirmative role for Federal agencies in the dissemination of Government information, consistent with law; and

"(ii) reflect a view that a public and private sector sharing of responsibility for information dissemination is sound public policy;

"(D) reflect that the head of each agency has the primary responsibility for management of Federal information resources; and

"(E) require an agency, in determining how to fulfill its public information dissemination functions, to consider—

"(i) whether dissemination is required by law;

"(ii) whether dissemination is necessary for the proper performance of agency functions;

"(iii) whether disseminating public information would assist in public oversight of agency operations or would promote the general social or economic welfare of the United States;

"(iv) if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service;

"(v) dissemination methods that will maximize the utility of the information to the public; and

"(vi) the economy and efficiency of Government operations.".

SEC. 105. PAPERWORK REDUCTION GOALS AND DEADLINES.

Section 3505 of title 44, United States Code, is amended to read as follows:

"§ 3505. Paperwork reduction goals and deadlines

"In carrying out the functions under this chapter, the Administrator shall upon the date of the enactment of the Federal Information Resources Management Act of 1989—

"(1) set a goal to reduce by September 30, 1990, the burden of Federal collections of information existing on September 30, 1989, by at least 5 percent;

"(2) for the fiscal year beginning on October 1, 1990, and the following fiscal year, set a goal to reduce the burden of Federal collections of information existing at the end of the immediately preceding fiscal year by at least 5 percent;

"(3) identify initiatives to reduce the burden of the Federal collections of information associated with individuals, businesses, educational institutions, and State and local governments, particularly with respect to the burden associated with Federal procurement and grant programs; and

"(4) identify areas of duplication in information collection requests and develop a schedule and methods for eliminating duplications.".

SEC. 106. FEDERAL AGENCY RESPONSIBILITIES.

Section 3506 of title 44, United States Code, is amended—

(1) in subsection (a) by striking out "Each" and inserting in lieu thereof "The head of each";

(2) in subsection (b)—

(A) by inserting "(1)" before "the head of each agency"; and

(B) by adding at the end thereof the following new paragraphs:

"(2)(A) Each official designated under paragraph (1) shall appoint a Chief Information Resources Management Official who shall—

"(i) report to the senior official (except in the case that the Chief Information Resources Management Official may be the senior official);

"(ii) be in the competitive service or in the senior executive service; and

"(iii) be a career appointee.

"(B) Any positions designated under this paragraph shall be career reserve positions.

"(C) The Chief Information Resource Management Official shall assist in agency information needs assessments and in the deployment of appropriate technological tools to gather, process, use, and disseminate information that is critical to successful accomplishment of program goals and agency mission.

"(3) Officials designated under paragraph (2) shall be well qualified through experience or training to carry out the programs and activities authorized under this chapter. Such officials shall be sufficiently independent of program responsibility, but shall work with program officials in fulfilling the requirements of subsection (c).";

(3) in subsection (c)—

(A) by redesignating paragraphs (1) through (6) as paragraphs (4) through (9), respectively;

(B) by redesignating paragraphs (7) and (8) (as designated before the date of the enactment of this Act) as paragraphs (11) and (12), respectively;

(C) by inserting before paragraph (4) (as redesignated in subparagraph (A) of this paragraph) the following new paragraphs:

"(1) establish an agency-wide program of information resources management;

"(2) develop, implement, and evaluate formalized training programs in consultation with appropriate agencies, on information resources management concepts, and educate program officials about information resources management as a managerial discipline requiring all managers to take responsibility for life cycle management of information resources;

"(3) develop information systems, processes and procedures that—

"(A) enhance the sharing of common data across program and agency lines consistent with law; and

"(B) maximize the usefulness and timely release of Government information to all users within and outside the agency, including the public where appropriate;";

(D) in paragraph (4) (as redesignated by subparagraph (A) of this paragraph) by amending such paragraph to read as follows:

"(4) systematically inventory and maintain current, complete records of the agency's information resources, including its major information systems, its automatic data processing equipment, and its information-skilled personnel, for use in developing and updating the agency's information resources management plans and for informing relevant public outside the agency;";

(E) in paragraph (9) (as redesignated by subparagraph (A) of this paragraph) by inserting "and retaining" after "sharing, dissemination,";

(F) by inserting after paragraph (9) (as redesignated by subparagraph (A) of this paragraph) the following paragraph:

"(10) establish and maintain an information dissemination management system that shall—

"(A) ensure that the public has timely, equitable, and equal access to the agency's public information products and services and that agency information dissemination programs disseminate agency public information products and services in an efficient, effective, and economical manner;

"(B) plan and budget for information dissemination at the time information is created or collected, and at other appropriate steps during the information life cycle;

"(C) provide to the public adequate advance notice when the agency initiates, terminates, or significantly modifies significant public information products and services; and

"(D) provide to the Superintendent of Documents for distribution to the Federal Depository Library Program all publications required by chapter 19 of this title to be made available;"; and

(G) in paragraphs (11) and (12) (as redesignated by subparagraph (B) of this paragraph) by amending such paragraphs to read as follows:

"(11) consistent with government-wide policies and guidance periodically evaluate and, as needed, improve, the accuracy, completeness, reliability, and timeliness of data and records contained within Federal information systems and the capabilities of such systems for ensuring—

"(A) public access to public information; and

"(B) privacy, confidentiality, and security;

"(12) develop and annually update the agency's information resources management plan in accordance with the appropriate guidelines issued by the Office of Information and Regulatory Affairs, a component of which shall be a five-year plan for meeting the information requirements and the information technology needs of the agency's programs and activities.";

(4) by amending subsection (d) to read as follows:

"(d) In carrying out functions under this chapter and any other functions involving review (not specifically authorized by this chapter) by the Office of Information and Regulatory Affairs of agency activities, the head of each agency shall establish and maintain a public file for each agency activity under review by that office. Such public file shall include with respect to the activity—

"(1) copies of all written materials regardless of format which the agency provides to or receives from the Office of Information and Regulatory Affairs;

"(2) information about all submissions made by the agency to the Office of Information and Regulatory Affairs, including—

"(A) the date of the submission;

"(B) the nature of the agency activity with respect to which the submission is made; and

"(C) the name of the person at the Office of Information and Regulatory Affairs to whom the submission is made; and

"(3) copies of all changes in the agency activity made as a result of recommendations by the Office of Information and Regulatory Affairs."; and

(5) by adding at the end thereof the following new subsections:

"(e) The head of each agency, or the official designated under subsection (b), shall establish a process for the review of each collection of information before it is submitted to the Administrator for review and approval under this chapter. At a minimum, this official shall ensure that the process—

"(1) is sufficiently independent of program responsibilities to evaluate fairly whether each collection of information should be carried out;

"(2) has sufficient resources to carry out such responsibility effectively; and

"(3) has authority independent of agency program officers to approve, disapprove, and make needed improvements in any agency collection of information.

"(f) Under the process established in subsection (e), the senior official shall certify to the Administrator that—

"(1) the collection of information and any related instructions—

"(A) are necessary for the proper performance of the agency's functions and are not unduly burdensome;

"(B) are not duplicative of information otherwise reasonably accessible to the agency;

"(C) have practical utility;

"(D) are written using plain and unambiguous terminology and are understandable to those who are to respond; and

"(E) explain the need and ultimate use of the information to be collected, and the importance of accurate and timely response; and

"(2) the agency has taken necessary steps—

"(A) to give notice to and consult with interested agencies and members of the public in order to enhance the clarity of that collection of information and to minimize its burden on respondents; and

"(B) to plan and allocate resources for the effective and efficient management and use of the information to be obtained.".

SEC. 107. APPROVAL AND DELEGATION OF INFORMATION COLLECTION; SELF-CERTIFICATION PROCESS.

Section 3507 of title 44, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2)(B)—

(i) by inserting "a summary of the request," after "title for the information collection request,";

(ii) by inserting "and benefit" after "an estimate of the burden"; and

(iii) by striking out "; and" and inserting in lieu thereof ", and given notice of a period of not less than 30 days for submission of comments by the public, and identification of an official at the agency and the Office of Information and Regulatory Affairs to whom comments may be submitted, including an address for each official;";

(B) by redesignating paragraph (3) as paragraph (4) and inserting after paragraph (2) the following:

"(3) the agency provides at least 30 days for public comment to the agency and the Office of Information and Regulatory Affairs after publication of notice in the Federal Register, and the agency and the Administrator consider comments received regarding the proposed collection of information; and";

(2) in subsection (b)—

(A) by inserting "but not before the thirty-day public comment period has concluded," after "receipt of a proposed information collection request,"; and

(B) by adding at the end thereof "The Administrator shall publish in the Federal Register for any information collection activity reviewed by the Office of Information and Regulatory Affairs an explanation of any disapproval or modification of a substantive or material nature.";

(3) in subsection (d)—

(A) by striking out "The Director" and inserting in lieu thereof "(1) The Administrator"; and

(B) by adding at the end thereof "This subsection shall not apply to a collection of information required by a rule."; and

(C) by adding at the end thereof the following new paragraphs:

"(2)(A) No later than ninety days before the expiration date of the control number assigned by the Administrator to a currently approved information collection, the head of the agency, or the designated senior official, may solicit public comment, through a Federal Register notice containing the same information as prescribed in subsection (a)(2)(B) and such other practicable steps as may be reasonable, on the need for, and burden imposed by the collection of information.

"(B) No later than sixty days before the expiration date of the control number assigned by the Administrator to a currently approved information collection not required by a rule, the head of the agency, may—

"(i) conduct the review required by section 3506(e); and

"(ii) certify to the Administrator, based on such public comment and his review as prescribed in this subsection, that he has made the determination required by subsection 3506(a).

"(C) Upon receipt of such certification, the Administrator shall, except as provided in paragraph (4) of this subsection, approve the collection of information for a period of three years.

"(D) If such a certification is not provided to the Administrator during the sixty-day period before the expiration of the control number, the agency shall submit the collection of information for review and possible approval or disapproval under this chapter.

"(3) An agency may not make a substantive or material modification to a collection of information after it has been approved by the Administrator, unless the modification has been submitted to the Administrator for review and possible approval or disapproval under this chapter.

"(4) The Administrator may at any time before issuance of the control number, upon notice in the Federal Register and to the agency stating the reasons therefor, request an agency to submit a collection of information for review and possible approval or disapproval under this chapter."; and

(4) by adding at the end thereof the following new subsections:

"(i)(1) As soon as practicable, but no later than publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Administrator a copy of any proposed rule which contains a collection of information requirement and upon request, information necessary to make the determination required pursuant to this chapter.

"(2) Within sixty days after the notice of proposed rulemaking is published in the Federal Register, the Administrator may file public comments pursuant to the standards set forth in section 3508 on the collection of information requirement contained in the proposed rule.

"(3) When a final rule is published in the Federal Register, the agency shall explain how any collection of information requirement contained in the final rule responds to the comments, if any, filed by the Administrator or the public, or explain why the agency rejected those comments.

"(4) The Administrator has no authority to disapprove any collection of information requirement specifically contained in an agency rule, if the Administrator has received notice and failed to comment on the rule within sixty days of the notice of proposed rulemaking.

"(5) No provision of this section may be construed to limit the Administrator, in his discretion from—

"(A) disapproving any information collection request which was not specifically required by an agency rule;

"(B) disapproving any collection of information requirement contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection;

"(C) disapproving any collection of information requirement contained in a final agency rule, if the Administrator finds within sixty days of the publication of the final rule that the agency's response to the comments of the Administrator filed pursuant to paragraph (2) of this subsection was unreasonable; or

"(D) disapproving any collection of information requirement where the Administrator determines that the agency has substantially modified in the final rule the collection of information requirement contained in the proposed rule where the agency has not given the Administrator the information required in paragraph (1), with respect to the modified collection of information requirement, at least sixty days before the issuance of the final rule.

"(6) The Administrator shall make publicly available any decision to disapprove a collection of information requirement contained in an agency rule, together with the reasons for such decision.

"(7) The authority of the Administrator under this subsection is subject to the provisions of subsection (c).

"(8) This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments.

"(9) The decision of the Administrator to approve or not to act upon a collection of information requirement contained in an agency rule shall not be subject to judicial review.

"(j) With respect to a collection of information required by rule that has a currently valid control number assigned by the Administrator—

"(1) the head of an agency shall provide agencies and other interested individuals opportunity to comment through notice in the Federal Register and, if necessary, other means on continuation of the collection activity, prior to the expiration date of the control number;

"(2) the Administrator may comment during the agency public comment period on the collection activity;

"(3) the head of an agency shall consider all comments received regarding the collection activity, and, after compliance with section 3506(e), shall submit to the Administrator and publish in the Federal Register—

"(A)(i) a description of comments received; and

"(ii) an explanation of its decision to continue the information collection activity unchanged, including how the collection activity comports with the principles and requirements of this chapter; or

"(B) notice that the agency proposes to make substantive or material modification to the information collection activity and that it has been submitted to the Administrator for review;

"(4) the Administrator shall assign a control number to extend the collection activity for a period of three years without any modification unless—

"(A) the agency has failed to comply with paragraphs (1) through (3) of this subsection; .

"(B) the agency proposes to make substantive or material modification to the information collection activity; or

"(C) the Administrator, having filed comments under paragraph (2)—

"(i) finds within thirty days that the agency's response to comments filed pursuant to paragraphs (1) and (2) and its decision on continuing the collection activity was arbitrary and capricious; and

"(ii) publishes such a finding in the Federal Register and announces that it will review the collection activity;

"(5) if the Administrator refuses to assign a control number under paragraph (4), he shall—

"(i) solicit public comment through the Federal Register and other means, if necessary, for further review of the collection activity; and

"(ii) consider such comment and have sixty days within which to review the information collection activity to determine whether it is necessary for the proper performance of the agency's functions, including whether it has practical utility;

"(6) to the extent the Administrator disapproves or recommends or instructs the agency to make a substantive or material change, he shall—

"(i) publish an explanation thereof in the Federal Register; and "(ii) instruct the agency to enter rulemaking to consider changing the information collection and submit any proposed modifications to the information collection activity under section 3507(i); and

"(7) nothing in this subsection effects the review process for new information collection activities established by section 3507(i) with respect to information collection requirements.".

SEC. 108. FEDERAL INFORMATION LOCATOR SYSTEM.

Section 3511 of title 44, United States Code, is amended to read as follows:

"§ 3511. Establishment and operation of Federal Information Locator System

"(a) The Administrator shall cause to be established and maintained a Federal Information Locator System (hereinafter in this section referred to as the 'system'), which shall—

"(1) serve as a comprehensive inventory, and as the authoritative register, of all information collection requests by the Federal Government to the public; and

"(2) be designated to assist agencies and the public in locating Government information.

"(b) In designing the system, the Administrator shall—

"(1) designate as necessary one or more agencies to operate the system;

"(2) require the head of each agency to prepare in a form to be specified by the Administrator, and to submit for inclusion in the system, a data profile for each—

"(A) system of records of the agency required to be identified under section 552a of title 5; and

"(B) information collection request and each information collection requirement approved by the Administrator pursuant to section 3506;

"(3) ensure that no information which is not public information is included in the system.

"(c) Within one year after the date of the enactment of the Federal Information Resources Act of 1989, the Administrator shall—

"(1) determine, in consultation with other agencies and the Advisory Committee on Information Policy, the optimal composition of the system in order to accomplish its purposes; and

"(2) report to the Senate Committee on Governmental Affairs and the House Committee on Government Operations on the status of the development and implementation of the system, including the Administrator's determination as to the composition of the system and the appropriate operating entity.

"(d) The Administrator shall on an ongoing basis review the effectiveness of the Federal Information Locator System.".

SEC. 109. REVIEW OF AGENCY ACTIVITIES; REPORTING; AGENCY RESPONSE.

Section 3513 of title 44, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) The Administrator shall on an ongoing basis review standards and requirements for agency audits for all major information systems and assign responsibility for conducting government-wide or multiagency audits (except the Administrator may not assign such responsibility for the audit of major information systems used for the conduct of criminal investigations or intelligence activities as defined in section 4-206 of Executive Order 12036, issued January 24, 1978, or successor orders, or for cryptologic activities that are communications security activities.

"(e) The Administrator shall on an ongoing basis—

"(1) establish and review a schedule and a management control system to ensure that practices and programs of information handling disciplines, including records management, are appropriately integrated with the information policies mandated by this chapter;

"(2) identify initiatives to improve productivity in Federal operations using information processing technology; and

"(3) develop and review a program to—

"(A) enforce Federal information processing standards, particularly software language standards, at all Federal installations;

"(B) revitalize the standards development program established under section 111(f)(2) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)(2)); and

"(C) separate such program from peripheral technical assistance functions and direct such program to the most productive areas; and

"(4) develop and annually revise, in consultation with the Administrator of General Services, the Secretary of Commerce, and the Archivist of the United States, a five-year plan for information resources management, which shall include—

"(A) plans for managing information throughout its life cycle from collection through dissemination and disposition, and

"(B) plans for meeting the automatic data processing equipment (including telecommunications) needs of the Federal Government in accordance with the requirements of sections 110 and 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 757, 759) and the purposes of this chapter.".

SEC. 110. RESPONSIVENESS TO CONGRESS.

Section 3514 of title 44, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (9)(C) by striking out "and" at the end thereof;

(B) in paragraph (10)(C) by striking out the period and inserting in lieu thereof a semicolon; and

(C) by adding at the end thereof the following new paragraphs:

"(11) a summary of the results of selective reviews performed in accordance with section 3513 of this title by Federal agencies of the adequacy and efficiency of their information resources management activities;

"(12) the report under the Privacy Act of 1974, when required by subsection (s) of section 552a of title 5, United States Code; and

"(13) the report on matching programs, when required by subsection (u)(6) of section 552a of title 5, United States Code.";

(2) by adding at the end thereof the following new subsection:

"(c) Within one year after the date of the enactment of the Federal Information Resources Management Act of 1989 the Administrator shall submit a report to the Senate Committee on Governmental Affairs and the House Committee on Government Operations—

"(1) on the Federal demonstration project in federally sponsored research that—

"(A) comprehensively lists all information collection requests subject to the requirements of the provisions of this chapter together with estimates of the associated burdens;

"(B) specifically identifies information requests subject to the provisions of this chapter which have not been justified by agencies and approved by the Administrator; and

"(C) provides recommendations which would reduce the burden associated with such requests by 5 percent while providing adequate accountability of expenditures;

"(2) on the progress of the initiatives identified under section 3505(3); and

"(3) on the results of the reduction in burden associated with the review under section 3503(3)."; and

(3) by adding at the end thereof the following new subsections:

"(d)(1) No later than July 1, 1991, the General Accounting Office shall report to the Senate Committee on Governmental Affairs and the House Committee on Governmental Operations, on the overall effectiveness and attentiveness of the Office of Information and Regulatory Affairs and the agencies in meeting all of the responsibilities assigned by law.

"(2) Such report shall include any recommendations for changes in law or administrative improvements necessary to better achieve the responsibilities assigned under law, including those related to both the Office of Information and Regulatory Affairs and the agencies.

"(e) Within one year after the date of the enactment of the Federal Information Resources Management Act of 1989 the Administrator shall report to the Congress, after consultation with other agencies and the Advisory Committee on Information Policy, on the feasibility and means of establishing a comprehensive inventory and authoritative register of all information dissemination products and services disseminated by the Federal Government, including whether an online service can best accomplish public access to Government information.".

SEC. 111. CONSULTATION AND ADVISORY COMMITTEES.

Section 3517 of title 44, United States Code, is amended to read as follows:

"§ 3517. Consultation and advisory committees

"(a) In reviewing information collection requests, the Administrator shall provide interested agencies and persons timely opportunity to comment.

"(b) In developing information and statistical policies, plans, rules, regulations, procedures, and guidelines, the Administrator shall regularly consult with information providers, users, and other interested parties, including the advisory committees established under the authority granted in this section.

"(c)(1) The Administrator shall establish an Advisory Committee on Information Policy to advise in carrying out the functions assigned under section 3504(b) and an Advisory Committee on Statistical Policy to advise in carrying out the functions assigned under section 3504(d)(1).

"(2) Each such committee shall consist of no less than twenty members.

"(d) The Administrator may establish any other advisory committee as may be appropriate.

"(e) Any advisory committee established by the Administrator shall—

"(1) be broadly representative of the groups with an interest in the relevant policy area;

"(2) include representatives of educational institutions, businesses, State and local governments, labor, public interest groups, and any other appropriate members.

"(3) provide for a two-year term for members appointed by the Administrator;

"(4) provide that an individual may be reappointed to the committee for any number of terms;

"(5) provide that appointments shall be made without regard to political affiliation; and

"(6) comply with the provisions of the Federal Advisory Committee Act (5 U.S.C. App.).

"(f) No later than one hundred and twenty days after the date of the enactment of the Federal Information Resources Management Act of 1989, the Administrator shall complete the initial appointment of members to the Advisory Committee on Information Policy and the Advisory Committee on Statistical Policy.".

SEC. 112. PUBLIC DISCLOSURE AND REPORTING BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS.

Chapter 35 of title 44, United States Code, is amended—

(1) by redesignating section 3518 through 3520 as sections 3519 through 3521; and

(2) inserting after section 3517 the following:

"**§ 3518. Public disclosure and reporting**

"(a) In carrying out the functions under the provisions of this chapter, or undertaken by the Office of Information and Regulatory Affairs under any other provision of law, the Administrator shall establish and maintain a public file for each agency activity under review, which includes—

"(1) copies of all written materials regardless of format related to any review activity which are received or provided by the Office of Information and Regulatory Affairs from or to a person who is not an employee of the Office of Management and Budget;

"(2) a list of all meetings with persons outside the Federal Government relating to a review activity;

"(3) ongoing information about any submission from an agency, including—

"(A) the date of the submission;

"(B) the name of the agency;

"(C) the name and type of the agency activity and the review for which it is submitted;

"(D) the name of any person within the Office of Information and Regulatory Affairs who is reviewing the submission; and

"(E) the decision, and the date of such decision, made by the Office of Information and Regulatory Affairs;

"(4) copies of any changes made as a result of recommendations by the Office of Information and Regulatory Affairs in the review of an agency activity, including the reasons and authority for such changes; and

"(5) an explanation of any approval, denial, or disapproval of an information collection submission.

"(b)(1) The Administrator of the Office of Information and Regulatory Affairs shall establish and maintain a public file for each agency rulemaking activity submitted to the Office of Information and Regulatory Affairs for review. Such public file shall be placed in the Office of Information and Regulatory Affairs public reading room at the time the first document in the agency rulemaking activity is submitted to the Office of Information and Regulatory Affairs for review. Such public file shall include—

"(A) copies of any drafts of advanced notice or notice of rulemaking;

"(B) copies of any proposed or final rule;

"(C) all written material regardless of format concerning the agency rulemaking activity that is exchanged between the Office of Management and Budget and the agency conducting the rulemaking activity;

"(D) all written material regardless of format received from persons outside the Federal Government concerning the agency rulemaking activities; and

"(E) a list of all meetings attended by the Office of Information and Regulatory Affairs employees with persons outside the Federal Government relating to the agency rulemaking activity.

"(2) At the end of each calendar month, the Administrator shall make public and place in the public reading room of the Office of Information and Regulatory Affairs a list of all proposed or final rules which are submitted for review by the Office of Information and Regulatory Affairs and the estimated length of the review of each.

"(3) As part of the public file described in paragraph (1), the Administrator shall place in the public reading room of the Office of Information and Regulatory Affairs all written materials received from persons outside the Federal Government concerning any agency rulemaking not under review.

"(4) The Administrator of the Office of Information and Regulatory Affairs shall—

"(A) send the appropriate agencies copies of all written material regardless of format concerning an agency rulemaking activity under review, that such office receives from persons who are not employees of the Federal Government;

"(B) advise the appropriate agencies on the substance of all oral communications concerning an agency rulemaking activity under review that the Office of Information and Regulatory Affairs has with persons who are not employees of the Federal Government; and

"(C) invite the appropriate agency heads to all scheduled meetings with persons who are not employees of the Federal Government concerning an agency rulemaking activity under review.

"(5) Only the Administrator and Deputy Administrator of the Office of Information and Regulatory Affairs may communicate with any person who is not employed by the Federal Government on regulations submitted to such office for review.

"(6)(A) The Administrator shall complete review of any regulatory activity of an agency, not later than the earlier of—

"(i) thirty days after the date of the submission of regulatory activity to the Office of Management and Budget by the agency in the case of a nonmajor rule and ninety days in the case of a major rule; and

"(ii) any date established by statute or court order for completion of the regulatory activity.

"(B) The period provided for under paragraph (1) for completion of review of a regulatory activity by the Office of Information and Regulatory Affairs may be extended for no more than thirty days upon a determination by the Administrator that such extension is absolutely necessary.".

SEC. 113. AUTHORIZATION OF APPROPRIATIONS.

Section 3521 (as redesignated in section 112 of this Act) of title 44, United States Code, is amended in subsection (a) by striking out "each of the fiscal years 1987, 1988, and 1989" and inserting in lieu thereof "fiscal year 1990, and $6,500,000 for fiscal year 1991".

SEC. 114. TECHNICAL AND CONFORMING AMENDMENTS.

(a) Table of Sections.—The table of sections for chapter 35 of title 44, United States Code, is amended by striking out the items relating to sections 3518 through 3520 and inserting in lieu thereof:

"3518. Public disclosure and reporting.

"3519. Effect on existing laws and regulations.
"3520. Access to information.
"3521. Authorization of appropriations.".

(b) AUTHORITY OF ADMINISTRATOR.—Chapter 35 of title 44, United States Code, is amended—

(1) in section 3504—

(A) in subsection (b)—

(i) in the first sentence by striking out "Director" and inserting in lieu thereof "Administrator"; and

(ii) in paragraph (5) by striking out "Director" and inserting in lieu thereof "Administrator";

(B) in subsection (c) by striking out "Director" and inserting in lieu thereof "Administrator";

(C) in subsection (e) by striking out "Director" and inserting in lieu thereof "Administrator";

(D) in subsection (f) by striking out "Director" and inserting in lieu thereof "Administrator"; and

(E) in subsection (g) by striking out "Director" and inserting in lieu thereof "Administrator";

(2) in section 3506(a) by striking out "Director" and inserting in lieu thereof "Administrator";

(3) in section 3507—

(A) in the section heading by striking out "Director" and inserting in lieu thereof "Administrator";

(B) in subsection (a)—

(i) in paragraph (1) by striking out "Director" and inserting in lieu thereof "Administrator";

(ii) in paragraph (2)(A) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator"; and

(iii) in paragraph (3) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(C) in subsection (b) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(D) in subsection (c)—

(i) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(ii) by striking out "Director's" and inserting in lieu thereof "Administrator's"; and

(iii) by striking out "section 3504(h) or 3509" and inserting in lieu thereof "subsection (i) of this section or section 3509";

(E) in subsection (e) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(F) in subsection (f) by striking out "Director" and inserting in lieu thereof "Administrator"; and

(G) in subsection (g) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(4) in section 3508 by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(5) in section 3509 by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(6) in section 3510(a) by striking out "Director" and inserting in lieu thereof "Administrator";

(7) in section 3511(b)—

(A) in the first sentence by striking out "Director" and inserting in lieu thereof "Administrator"; and

(B) in paragraph (2) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(8) in section 3512 by striking out "Director" and inserting in lieu thereof "Administrator";

(9) in section 3513—

(A) in the heading by striking out "Director" and inserting in lieu thereof "Administrator";

(B) in subsection (a) by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(C) in subsection (b) by striking out "Director" and inserting in lieu thereof "Administrator"; and

(D) in subsection (c)—

(i) by striking out "Director" and inserting in lieu thereof "Administrator"; and

(ii) by striking out "Director's" and inserting in lieu thereof "Administrator's";

(10) in section 3514(a)—

(A) in the first sentence by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(B) in the second sentence by striking out "Director" and inserting in lieu thereof "Administrator";

(C) in paragraph (2) by striking out "Director" and inserting in lieu thereof "Administrator"; and

(D) in paragraph (3) by striking out "Director" and inserting in lieu thereof "Administrator";

(11) in section 3515 by striking out "Director" each place it appears and inserting in lieu thereof in each such place "Administrator";

(12) in section 3516 by striking out "Director" and inserting in lieu thereof "Administrator"; and

(13) in section 3519 by striking out "Director" and inserting in lieu thereof "Administrator".

TITLE II—COMMISSION ON FEDERAL INFORMATION

SEC. 201. FINDINGS.

The Congress finds that—

(1) information is the infrastructure for decisionmaking and is vital to ensure—

(A) the efficient and effective operation of the Federal Government; and

Federal Government; and

(B) an informed citizenry which is the foundation of a democratic society;

(2) the Federal Government is an important provider of information, both for its own use and for use by State and local governments, business, and the public;

(3) the Federal information and statistical data system has not kept pace with changes in the United States economy and society and may lack the ability to provide relevant information for future decisions; and

(4) there are problems of quality and timeliness with Federal information and statistical data.

SEC. 202. ESTABLISHMENT OF THE COMMISSION.

There is established a Commission on Federal Information (hereafter referred to as the "Commission").

SEC. 203. FUNCTIONS OF THE COMMISSION.

(a) STUDY.—The Commission shall study and investigate statutes, policies, rules, regulations, procedures, and practices of the Federal Government relating to information gathering, processing, analysis and dissemination. The Commission shall consider—

(1) the contribution that Federal information and statistical data makes to the general economic and social welfare and to the competitive position of the United States in the world economy;

(2) long term needs for information and statistical data that can and should be filled by the Federal Government;

(3) gaps in existing information and statistical data relative to such needs;

(4) other deficiencies in providing for needed information and statistical data, including problems of quality, timeliness, and the relevancy of such information;

(5) priorities for the collection of such information and statistical data in light of changes in the economy and society; and

(6) organizational structures needed to—

(A) coordinate the decentralized Federal statistical system; and

(B) ensure ongoing improvements within the Federal statistical system and the Federal information system in light of changes in the economy and society.

(b) FINAL REPORT.—No later than July 1, 1991, the Commission shall submit a final report to the Congress and the President containing a review of its findings and its recommendations for changes in statutes, policies, rules, regulations, procedures, and practices. The Commission may make such interim reports and recommendations as it determines advisable.

(c) OFFICE OF MANAGEMENT AND BUDGET IMPLEMENTATION.—Upon submission of the Commission's final report, the Office of Management and Budget, in coordination with the executive agencies, shall take action to—

(1) formulate the views of the executive agencies on the recommendations of the Commission;

(2) the extent practicable within the limits of authority and resources of each such agency, carry out the recommendations of the Commission in which such agencies concur; and

(3) propose legislation necessary to carry out other recommendations of the Commission in which such agencies concur.

(d) OFFICE OF MANAGEMENT AND BUDGET REPORT.—At least once every 6 months after the submission of the final report of the Commission, the Office of Management and Budget shall report to the Congress and the President on the status of actions taken or to be taken under this section. Within 2 years after the submission of the final report of the Commission, the Office of Management and Budget shall submit a final report of such actions to the President and the Congress.

SEC. 204. MEMBERSHIP OF THE COMMISSION.

(a) MEMBERSHIP.—The Commission shall be composed of 16 members, including—

(1) 2 Members of the Senate (who shall not be members of the same political party) appointed by the President of the Senate;

(2) 2 Members of the House of Representatives (who shall not be members of the same political party) appointed by the Speaker of the House of Representatives;

(3) the Director of the Office of Management and Budget and 2 other officials or employees of the executive branch of the Federal Government appointed by the President of the United States;

(4) 2 members from among officials of the State and local governments (who shall not be members of the same political party) appointed by the President of the United States; and

(5) 7 members from the public, including information users and providers, and other interested groups, appointed by the President of the United States without regard to political affiliation.

(b) CHAIRMAN.—The Commission shall select a Chairman and a Vice Chairman from among its members.

(c) QUORUM.—Eight members of the Commission shall constitute a quorum.

(d) VACANCIES.—Any vacancies in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(e) INITIAL APPOINTMENTS.—Initial appointment to the Commission shall be made within 60 days after the date of the enactment of this Act.

SEC. 205. TRAVEL EXPENSES.

While away from their homes or regular places of business in the performance of service for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5 of the United States Code.

SEC. 206. POWERS OF THE COMMISSION.

(a) HEARINGS.—The Commission, or at its direction, any subcommittee or member thereof, may, for purposes of carrying out the provision of this title, hold such hearings, sit and act at such times and places, take such testimony, receive such evidence and administer such oaths, as the Commission or such subcommittee or member may determine advisable. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States. Any member of the Commission may administer the oaths or affirmation to witnesses appearing before the Commission or before such subcommittee or member.

(b) PERSONNEL.—The Commission may appoint and fix the compensation of personnel without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and such personnel may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at a rate not to exceed the maximum rate authorized by the General Schedule. In addition, the Commission may procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for the maximum rate authorized by the General Schedule.

(c) CONSULTANTS.—The Commission is authorized to negotiate and enter into contracts with private organizations and education institutions to carry out such studies and prepare such reports as the Commission determines are necessary in order to carry out its duties.

SEC. 207. COOPERATION WITH FEDERAL AGENCIES.

(a) FURNISHING INFORMATION.—Each department, agency, and instrumentality of the Federal Government is authorized and directed to furnish to the Commission, upon requests made by the Chairman, such data, reports, and other information not otherwise prohibited by law as the Commission determines necessary to carry out its functions under the section.

(b) PROVISION OF SERVICES.—The head of each department or agency of the Federal Government is authorized to provide to the Commission such services as the Commission requests on such basis, reimbursable or otherwise, as may be agreed between the department or agency and the Chairman or Vice Chairman of the Commission. All such requests shall be made by the Chairman or Vice Chairman of the Commission.

SEC. 208. TERMINATION OF THE COMMISSION.

One hundred and twenty days after the submission of the final report provided for in section 203, the Commission shall cease to exist.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title.

TITLE III—MANAGEMENT OF PUBLIC RECORDS

SEC. 301. BINDING REGULATIONS CONCERNING PUBLIC RECORDS.

(a) DISPOSAL OF RECORDS.—Section 3302 of title 44, United States Code, is amended—

(1) in the first sentence by inserting "and binding on all Federal agencies" after "chapter"; and

(2) by redesignating paragraphs (1) through (3) as paragraphs (3) through (5), respectively, and inserting before such newly redesignated paragraph (3) the following new paragraphs:

"(1) standards for interpreting the definition of records under section 3301,

"(2) standards for establishment and maintenance of adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency for incorporation in recordkeeping requirements to be issued by heads of agencies,".

(b) ESTABLISHMENT OF PROGRAM OF MANAGEMENT.—Section 3102(3) of title 44, United States Code, is amended by striking out "and 3101–3107, of this title and the regulations" and inserting in lieu thereof "3101–3107, and 3301–3314, of this title and the regulations and standards".

(c) EXAMINATION OF RECORDS FOR HISTORICAL PRESERVATION.—(1) Section 2107 of title 44, United States Code, is amended—

(A) in the first sentence by inserting "(a)" before "When it appears"; and

(B) by adding at the end thereof the following new subsection:

"(b) Subject to the provisions of section 2906 of this title and notwithstanding any other provision of law, the Archivist or the designee of the Archivist may inspect or examine any record to determine if—

"(1) an agency is in compliance with the binding guidelines issued by the Archivist; and

"(2) such record has sufficient value to warrant the continued preservation by the United States Government.".

(2) Section 2906 of title 44, United States Code, is amended—

(A) in subsection (a)(1) by striking out the first sentence and inserting in lieu thereof: "In carrying out their respective duties and responsibilities under this chapter and under chapters 21, 31, 33, and 35 of this title, the Administrator of General Services and the Archivist (or the designee of either) may inspect the records or the records management practices and programs of any Federal agency for the purposes of rendering recommendations for the improvement of records management practices and programs. The Archivist (or a designee) may inspect the records of any Federal agency for the purpose of determining whether records in the custody of the agency have sufficient historical, administrative, legal, research or other value to warrant their further preservation by the Government.";

(B) in subsection (a) by amending paragraph (2) to read as follows:

"(2) The Administrator and the Archivist shall promulgate regulations (subject to the approval of the President) to—

"(A) provide for the inspection of records, the use of which is restricted by law; and

"(B) provide that regulations authorizing and restricting the examination and use of such records applicable to the head of the custodial agency or to employees of that agency are applied in the same manner to the Archivist and the Administrator and to the employees of the National Archives and Records Administration and General Services Administration, respectively."; and

(C) in subsection (b) by inserting "and in sections 2107 and 3303a of this title" after "subsection (a) of this section".

(3) The first sentence of section 3303a(a) is amended to read as follows: "Subject to the limitations of section 2906 and notwithstanding any other provision of law, the Archivist

shall examine the lists and schedules submitted under section 3303, and the Archivist or the designee of the Archivist may examine any record on such lists or schedule.".

SEC. 302. REPORTS ON ROUTINE USES.

Section 552a(t) of title 5, United States Code, is amended by striking out "or a matching program" and inserting in lieu thereof "a matching program, or a routine use".

FACT SHEET

S. 1742

THE FEDERAL INFORMATION RESOURCES MANAGEMENT ACT OF 1989

MAJOR THEMES

1. To reauthorize the Paperwork Reduction Act with emphasis on its original intent and purposes and to increase efforts to reduce duplicative Federal information collection and minimize paperwork burden on the public.

2 To strengthen the information infrastructure and statistical database of the Federal government, including improving agency capabilities and public access to government information.

3. To set a national information resources management policy, which serves to integrate all information functions within a lifecycle management system in Federal agencies.

4. To improve the efficiency and effectiveness of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in carrying out all its responsibilities under this law.

KEY PROVISIONS

1. STRENGTHENS PAPERWORK REDUCTION EFFORTS

The importance of a strong and ongoing government-wide effort to reduce the burden of unnecessary government paperwork cannot be overstated. A renewed and unified effort by the Congress, the Executive Branch, and Federal agencies is required to attack the mountain of paperwork faced by businesses, university researchers, and other individuals. The "Federal Information Resources Management Act" reflects a studied and constructive approach towards addressing this important problem.

* Reauthorizes existing Federal information collection provisions of law.

* Continues the overall reduction goal of reducing paperwork by 5 percent each year.

- Requires OIRA to identify initiatives to reduce paperwork burdens associated with individuals, business, educational institutions, state and local governments especially with respect to procurement and Federal grant programs. A report to Congress is required which specifically addresses the impact of burden reduction programs for those most heavily burdened.

- Requires that agency information collection's are: at least burdensome necessary for the proper performance of an agency's functions; are not duplicative of information reasonably accessible to the agency; have practical utility; are written using plain and unambiguous terminology and are understandable to those who are to respond; and explain the need and ultimate use of the information to be collected, and the importance of an accurate and timely response.

2. IMPROVES INFORMATION RESOURCES MANAGEMENT

Government information must be made a high priority as a valuable and useful resource to government and society. As such, it must be managed in a coordinated and systematic manner based on established principles of information resources management. OIRA, in conjunction with other government entities with centralized information management responsibilities, must take leadership in developing coherent information policy which gives balanced and needed emphasis to all information functions. Federal agencies must establish parallel, but independent, information resources management programs.

- Creates a new purpose which emphasizes public benefit, quality, and use of government information as important priorities.

- Creates a new definition for "managing information resources" emphasizing comprehensive life-cycle approach to information policy development.

- Requires OIRA Administrator to give balanced and needed emphasis to all major information policy functions and to coordinate information policy with other central information agencies.

- Encourages OIRA is to devote significantly more of its limited resources to functions required under this law, (e.g. statistical policy, privacy, information technology) which have been neglected in the past.

- Increases the responsibility of the OIRA Administrator in the area of statistical policy in order to strengthen the leadership and coordination of our decentralized statistical system. Specifically, there as a new overall leadership role, a new international coordination role, and an emphasis on dissemination of statistics to the public.

* Establishes interagency working groups to strengthen information policy coordination as part of OIRA's information policy functions. These working groups are changed with coordinating both the development and the implementation of information policy. A specific statistical policy interagency working group is also required, to be headed by the chief statistician and including at least the heads of the major statistical agencies. This working group is charged with coordinating all of OIRA's statistical functions.

3. REAFFIRMS OIRA RESPONSIBILITY FOR POLICY GUIDANCE

OIRA's responsibility for agency information activities is to ensure that they are well run, not to run them. OIRA's relationship to Federal agencies must be structured to provide policy guidance, not day-to-day approval or disapproval of agency information activities. Federal information resources management capabilities must be strengthened, and agencies must take greater responsibility for fulfilling the full range of information functions.

* Emphasizes the concept of "information resources management" to improve acquisition and use of information to meet information needs in government agencies and the public. The new title "FEDERAL INFORMATION RESOURCES MANAGEMENT ACT", and other sections identifies this concept as a major purpose of the Act, creating a new definition of the concept, and modifying existing definitions.

* Requires OIRA to develop policy, guidance, and standards to provide direction to agencies and to ensure the development of formalized training programs in Information Resources Management concepts for OMB staff and agency officials.

* Strengthens agency responsibility and accountability in all areas of information resources management. Each agency head is directed to appoint a career Chief Information Resources Management Official with appropriate credentials, and each agency is required to establish an agency-wide IRM program, to provide formalized training programs for agency officials, and to integrate IRM programs and agency activities.

* Creates a self-certification of continuing information collection activities by Federal agencies which is

designed to shift OMB's resources away from "routine, reoccuring, and regular" information collection approval, and to encourage agencies to assume responsibility for the quality and necessity of information programs. Importantly, this applies only to ongoing information collections which currently have to be submitted at the end of every three years for reapproval -- and which OMB argues is a time consuming rubber stamping function. The new provision retains OMB's authority to conduct a reapproval on request.

* Emphasizes OIRA's responsibility to provide guidance, not operational authority, for agency information dissemination activities.

* Establishes interagency working groups on information and statistical policy to coordinate agency activities and strengthen agency participation and responsibilities.

4. ESTABLISHES A COMMISSION ON FEDERAL INFORMATION

The Federal information and statistical data system has not kept pace with changes in the U.S. economy and society, and may lack the ability to provide relevant information for future decisions. An in-depth review is needed to ensure that there are ongoing improvements within this system.

* Creates a Commission on Federal Information to examine the broad question of the quality of the Federal information (including statistical) infrastructure. The functions of the Commission are: to look at the contribution of information to economic and social welfare and to competitiveness; to identify long term information needs; to identify gaps and other problems in the current system especially with respect to quality, timeliness and relevancy; to set priorities for information in light of changes in the economy and society; and to look at how better to organize the information system for better coordination and to ensure that the system is capable of keeping up with the changes in the economy and society. In part, these functions represent an update of the 1970 President's Commission on Federal Statistics.
The structure of the Commission is patterned after the Paperwork Commission. Membership includes two Senators (from different parties), two Representatives (from different parties), the OMB Director, two other Federal officials, two representatives of State and local government, and 7 members of the public. Except for the members of Congress and the OMB Director, the appointments are by the President. The Commission must report back its findings to Congress by July, 31 1991.

5. INCREASES PUBLIC PARTICIPATION AND OIRA ACCOUNTABILITY

There is a need to increase public participation in, and improve the accountability of, OIRA and Federal agency decision making.

* Requires OIRA to maintain a public record of any information collection or regulatory review, which includes a written justification of any OIRA denial, disapproval or modification.

* Requires that OIRA provide agencies with written materials sent to OMB and a summary of oral communications involving non-governmental representatives regarding a rulemaking activity and that OIRA invite agency heads to all scheduled meetings with non-governmental representatives.

* Limits "Ex Parte" communication by OIRA officials on regulatory review activity with non-governmental representatives to OIRA Administrator and Deputy Director.

Limits OIRA regulatory review to 30 days for nonmajor rules and to 90 days for major rules with a 30 day extension.

* Strengthens consultation and creates Advisory Committees on Information Policy and on Statistical Policy.

* Re-orients the Federal Information Locator System, (FILS) so that it can better serve as a tool for agencies and the public in the information collection process.

* Requires OIRA to develop a plan to create a system to help the public to find Federal information dissemination products and services.

6. STRENGTHENS FEDERAL LEADERSHIP AND OVERSIGHT

Congress and the Executive Branch must provide stronger leadership, management, and guidance, and conduct oversight to ensure that the purposes and objectives of the Act are met.

* Gives responsibility and authority for functions of OIRA directly to the OIRA Administrator (a confirmable position since 1986). The OMB Director still specifically retains overall responsibility for OIRA

activity, but this forces the Administrator to assume responsibility for expenditures and fulfillment of OIRA functions under law.

* Requires professional credentials of the Administrator to be related to the enumerated functions of OIRA in the law. Especially in light of forthcoming vacancy at OIRA, this stresses the need for an Administrator who can fulfill the information policy functions and management needs of OIRA. It also seeks the selection of an OIRA Administrator who is driven by the functions of OIRA as stated in law, and not other activities chosen by the White House.

* Creates a separate budget line item for OIRA which will establish stronger congressional oversight and accountability fo OIRA. Importantly, during off-reauthorization years, this will result in an annual appearance by OIRA before Congress.

* Requires a review by the GAO to measure OIRA effectiveness in carrying out its responsibilities under the Act.

* Reauthorizes the legislation for a two year period in order to strengthen congressional oversight.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

November 29, 1989

TO : Senate Subcommittee on Government Information and Regulation, Committee on Governmental Affairs
Attention: Steve Katz

FROM : American Law Division

SUBJECT : Section-By-Section Analysis of S.1742, the Federal Information Resources Management Act of 1989

Pursuant to your request, we have prepared the attached section-by-section analysis of S.1742, the Federal Information Resources Management Act of 1989.

Morton Rosenberg

Morton Rosenberg
Specialist in
American Public Law

SECTION BY SECTION ANALYSIS OF AMENDMENTS TO CHAPTER 35 OF TITLE 44 U.S.C.

THE FEDERAL RESOURCES MANAGEMENT ACT OF 1989

Section 1. Short Title.

The name of the law is changed from the Paperwork Reduction Act to the Federal Information Resources Management Act of 1989 to reflect its expanded scope and added priorities.

Section 2. Findings.

Section 2 details the congressional findings that guide the expanded focus of the law. It is found that the paperwork burden on the public has increased and that additional efforts need to be exerted on behalf of individuals, businesses, educational institutions, and State and local governments to reduce that burden, particularly with respect to the burden associated with the Federal procurement and grant programs. The Office of Management and Budget needs to do more to accomplish the information management functions assigned to it in light of the changing information needs of the Government and society. The Office of Management and Budget needs to promote the concept of information resources management as a means of strengthening agency information management capabilities. Coordination of information policy depends on stronger leadership from the Congress and the executive branch. The Office of Management and Budget review of agency submissions requires less delay and more public accountability.

Section 3. Table of Contents.

The Act is amended into three separate titles:

Title I -- Information Resources Management of Federal Departments and Agencies

Title II -- Commission on Federal Information

Title III -- Management of Public Records

Section 101. Purposes.

Section 101 reiterates and expands upon the Act's original orientation on reduction of excess government paperwork by emphasizing the need for a coordinated and comprehensive Federal information management process that will ensure that the public will secure the greatest possible benefit from information collected, maintained, used, disseminated, and retained by the government; that government information is used to strengthen decisionmaking, accountability, and efficiency in Government and society; that automatic data processing, communication, and other information technologies are acquired and used to achieve the purposes this chapter; that to the extent practicable Federal information policies and practices be made uniform; that the accountability of the Office of Management and Budget and all Federal agencies to Congress for the implementation of this chapter be improved; and that the collection, maintenance, dissemination and retention of information by the Federal government is consistent with applicable laws, including the Privacy Act, the Computer Security Act of 1987, the Freedom of Information Act, and title 44 of the United States Code.

Section 102. Definitions.

1. A definition of "Administrator", to mean the Administrator of the Office of Information and Regulatory Affairs, is added.

2. The term "burden" is clarified by detailing examples of resources that may be expended that are to be included in the calculation of burden.

3. A definition of "information resources" is added which includes data and information in any format; individuals having information related skills; and related resources such as information technology.

4. The term "information resources management" is redefined to encompass the entire process of creating, developing and implementing information policy established by the Act.

5. The term "information systems" is redefined to mean a collection of information developed or acquired through either manual or automated means to fulfill an agency's mission, goals or objectives; the processes, procedures, and personnel to obtain, maintain, use and disseminate information; and the related information technology resources.

6. A definition of "information technology" is added which encompasses the hardware and software used in connection with Government information, regardless of the technology involved.

7. A definition of "major information system" is added which sets forth the criteria for identifying an information system that requires special continuing management attention.

Section 103. Office of Information and Regulatory Affairs.

Section 3503 of title 44 is amended to place ultimate responsibility for implementation of Chapter 35, and the coordination of its provisions with the other functions of the Office of Management and Budget, in the Director of the Office of Management. An Administrator is designated the head of the Office of Information and Regulatory Affairs who is to be appointed by the President with the advice and consent of the Senate. The President is directed to pay special attention to the qualifications and credentials of the appointee which may relate to the functions of the office. The Office of Information and Regulatory Affairs is to be included as a separate line item in the Office of Management and Budget's annual budget submission.

Section 104. Authority and Functions of the Administrator.

Section 104(a) amends section 3504(a) of title 44 to reflect the more comprehensive view of government information resources management now embodied in the Act. The Administrator is directed to give balanced emphasis to all functions committed to his charge and to coordinate the development and implementation of information with other concerned agencies.

Section 104(b) amends section 3504(c)(5) and (6) to emphasize the need to seek reductions in the information collection burden in the areas of Federal procurement and grant programs.

Section 104(c) amends Section 3504(d) respecting the Administrator's statistical policy and coordination functions to emphasize the need for planning, coordination and leadership in the development of the Federal statistical capability. These functions are to be directly carried out by a chief statistician to be appointed by the Administrator.

Section 104(d) amends section 3504(f) respecting the Administrator's privacy functions by adding provisions requiring him to oversee the development of new information systems by agencies containing personal information to ensure that they comply with the policies, principles, standards and guidelines of existing laws, to report the results of periodic compliance reviews to the Congress, and to recommend necessary remedial legislation to the President for submission to the Congress.

Section 104(e) adds a new section 3504(h) which details the information dissemination functions of the Administrator. Those responsibilities are to include the development and issuance of guidelines, after notice and receipt of public comment, with respect to agency fulfillment of information and dissemination functions, the promotion of policy research and development in the area of information dissemination to serve as a basis for the development of effective guidance for program and policy development in Federal agencies, the establishment of procedures for systematic oversight to ensure that the guidelines are carried out, and coordination of the identification of priorities for the development of uniform technical standards. With regard to such technical standards, the National Institute of Standards and Technology is directed to issue uniform technical standards, after consultation with the public and appropriate agencies, and the Office of Management and Budget is to encourage their usage and monitor their effectiveness. The guidelines to be issued by the Administrator must be developed in consultation with central information management agencies possessing governmental dissemination authority under law and be designed to strengthen public access to Government information, regardless of format, consistent with existing law. The guidelines must maintain an affirmative role for Federal agencies and reflect that agency heads have the primary responsibility for management of Federal information resources and that a public and private sector sharing of responsibility for information dissemination is sound policy. The guidelines will require that agencies, in determining how to fulfill their information dissemination functions, consider: (1) whether dissemination is required by law; (2) whether dissemination is necessary for the proper performance of agency functions; (3) whether disseminating public information would assist in public oversight of agency operations or would promote the general social or economic welfare of the Unites States; (4) whether an information product or service available from public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service; (5) whether dissemination methods will maximize the utility of the information to the public; and (6) whether it serves to promote the economy and efficiency of Government operations.

Section 105. Paperwork Reduction Goals and Deadlines.

Section 105 revises section 3505 by directing the Administrator to set goals of 5% in the reduction of the information collection burden by September 30, 1990, and reductions of at least 5% each for the fiscal years 1991 and 1992. The Administrator is to identify initiatives associated with the collection burden, especially with respect to the burden associated with Federal procurement and grant programs, and to identify areas of duplication in information requests and develop a schedule and methods for eliminating them.

Section 106. Federal Agency Responsibilities.

Section 3506 is amended to place primary responsibility for information management in the agencies. Agency heads must appoint a Chief Information Resources Management Official, who is to be a career official and shall have a degree of independence from program responsibilities, to assist in agency management needs assessments and in the deployment of appropriate technological tools to gather, process, use, and disseminate information that is crafted to achieve successful accomplishment of program goals and the agency mission. The Chief Information Resources Management Official reports to the senior official designated by the agency head to carry out the responsibilities of the agency under this chapter, who in turn reports directly to the agency head. Each agency is to establish an agency-wide program of information resources management which embodies a life-cycle approach to the management of information resources and takes into account the accessibility, usefulness, and timely and equitable public release of Government information.

New section 3506(d) provides for the establishment by each agency of a public file for each function required by this chapter which involves review of an agency activity, or any other function involving review (not specifically authorized by this chapter), by the Office of Information and Regulatory Affairs. The file must include with respect to each activity under review (1) copies of all written materials regardless of format which the agencies provide to or receives from the Office of Information and Regulatory Affairs; (2) information about such agency submissions including the date of the submission, the nature of the activity with respect to which the submission is made, and the name of OIRA official to whom it is submitted; and (3) copies of all changes in the agency activity made as a result of OIRA recommendations.

Sections 3506(e) and (f) requires that the agency head or the senior official designated by him establish a review procedure for information collection requests prior to submission to the Administrator. The agency reviewer must be sufficiently independent of program responsibilities to be able to approve, disapprove or make improvements in any agency collection of information. The senior official must certify to the Administrator that (1) the collection of information is necessary to the proper performance of the agency's function and are not unduly burdensome; are not duplicative of information readily available to the agency; have practical utility; are plainly written and understandable to potential respondents; and explain the need and ultimate use of the information to be collected and the need for accurate and timely responses; and (2) that the agency has taken steps to notify and consult with other agencies and the public with respect to the clarity and possible burden of the information collection and will use the information collected effectively and efficiently.

Section 107. Approval and Delegation of Information Collection; Self-Certification Process.

Sections 3507(a) and (b) are amended to provide that after submission of a proposed information collection request to OIRA the agency must provide notice in the Federal Register of at least a 30 day period in which the public may comment to the agency and to OIRA on the submission. The Administrator may not act on the proposal before the expiration of the 30 day comment period and must publish in the Federal Register an explanation of any disapproval or modification of any proposal which is substantive or material in nature.

Section 3507(d) is amended to provide a procedure for self-certification for currently approved information collections *not required by rule*. No later than 90 days prior to the expiration of the control number of a currently approved information collection request the agency head or designated senior official may publish notice in the Federal Register soliciting public comment on the need for and burden imposed by the subject collection of information. No later than 60 days prior to the expiration date of the control number the agency head may conduct the review required by section 3506(e) and certify to the Administrator, based upon the public comment received and his review as prescribed in this subsection, that he has made the determination required by section 3506(a). Upon receipt of the certification the Administrator must approve the collection of information for a period of three years unless prior to issuance of a control number the Administrator, upon notice in the Federal Register and to the agency stating reasons therefor, requests an agency to submit a collection of information for review and possible approval or disapproval under this chapter. If an agency does not submit a certification during the 60-day period before expiration of a control number, it must submit the collection of information for possible approval or disapproval by the Administrator. Substantive or material modifications to a collection of information after its approval may not be made unless it is submitted for review and possible approval or disapproval by the Administrator. Information collection requests may not be approved by the Administrator for a period longer than three years.

Section 107(4) adds new sections 3507(i) and (j) which deal with reveiw procedures for proposed rules which contain information collection requirements.

Section 3507(i) provides that a proposed rule which contains an information collection requirement must be forwarded to the Administrator no later than the date of publication of a notice of proposed rulemaking in the Federal Register. The Administrator may file public comments within 60-days after the Federal Register notice. The agency must explain how any collection of information requirement contained in a final rule responds to the Administrator's or public's comments, if any; or explain why it rejected those comments, at the time of publication of the final rule in the Federal Register. The Administrator may not disapprove any collection of information specifically contained in a rule if he had notice and failed to comment on the rule within 60 days of the notice of proposed rulemaking. But the Administrator may disapprove any information collection request (1) which was not specifically required by an agency rule; (2) if the agency did comply with the notification requirements of subsection 1; (3) if the Administrator finds within 60-days of the publication of the final rule that the agency's response to the comments of the Administrator is unreasonable; or (4) if the Administrator finds that the agency has substantially modified in the final rule the collection of information requirement originally contained in the proposed rule and has not given the Administrator the information required by subsection 1 with respect to the modified information collection requirement at least 60-days before issuance of the final rule. Any disapproval by the Administrator shall be made publicly available, together with the reasons for the decision. The decision of the Administrator to approve or not act upon a collection of information requirement contained in an agency rule is not subject to judicial review.

Section 3507(j) establishes procedures for review of information collection requirements required by rule that have currently valid control numbers assigned by the Administrator. The head of an agency must provide an opportunity for comment for the continuation of a collection activity prior to the expiration of the control by notice in the Federal Register. The Administrator may also comment during the public comment period. After the close of the comment period the agency head shall consider all comments and submit to the Administrator and the Federal Register either a description of the comments received together with an explanation of its decision to continue the collection activity, including how the collection activity comports with the principles and requirements of this chapter; or a notice that it proposes to make substantive or material modifications to the information collection activity and has submitted them to the Administrator for review. The Administrator must assign a control number to extend the collective activity for three years without any modification unless (1) the agency has failed to comply with the notice, comment and explanation requirements of this section; (2) the agency proposes to make substantial or material modifications to the information collection requirement; or, (3) having filed timely comments to the information collection requirement, the Administrator finds within 30 days that the agency's response to his comments and its decision to continue the collection activity are arbitrary and capricious and publishes such finding in the Federal Register together with notification that it will review the collection activity. If the Administrator refuses to assign a control number, he must solicit further public comment on the collection activity. The Administrator must consider such comment in determining whether the collection activity is necessary for the proper performance of the agency's functions, including whether it has practical utility. The Administrator must render his determination within 60 days. If the Administrator disapproves the collection activity, or instructs the agency to make substantive or material changes, he must publish an explanation of the reasons for his determination in the Federal Register and direct the agency to commence a rulemaking proceeding to consider changing the information collection. Thereafter, any proposed modifications must be submitted for review pursuant to the procedures for new information collections activities established by section 3707(i).

Section 108. Federal Locator System.

Section 3511 is amended to direct the Administrator to establish a Federal Information Locator System which is to serve as a comprehensive inventory and authoritative register of all information requests by the Federal government to the public and to assist agencies and the public in locating Government information. Each agency will provide a data profile of all systems of records required to be identified under the Privacy Act and each information request and requirement approved by the Administrator. Within one year of the date of enactment the Administrator, in consultation with other agencies and the Advisory Committee on Information Policy, shall determine the optimal composition of the system and report to the Senate Committee on Governmental Affairs and the House Committee on Government Operations on the status of the development and implementation of the system. The Administrator is charged with reviewing the effectiveness of the system on an ongoing basis.

Section 109. Review of Agency Activities; Reporting; Agency Response.

Section 3513 is amended by adding provisions requiring the Administrator to engage in more intense review, audit, and oversight of information management programs and practices to ensure that the policies and principles of the Act are being effectuated, including the development of a five-year plan for information resources management in consultation with the Administrator of General Services, the Secretary of Commerce, and the Archivist of the United States.

Section 110. Responsiveness to Congress.

Section 3514 is amended to require that the Administrator's annual and other periodic reports to Congress include a summary of the results of reviews performed in accordance with amended section 3513; the report required by the Privacy Act of 1974; and the report on matching programs when required by subsection (u)(6) of the Privacy Act. Also, within one year of the enactment the Administrator is to submit (1) to the Senate Committee on Governmental Affairs and the House Committee on Government Operations a report on the Federal demonstration project in federally sponsored research that comprehensively lists all information collection requests subject to the requirements of the Act together with estimates of associated burdens; specifically identifies information requests that have been rejected by the Administrator; and provides recommendations to reduce the burdens of such requests by 5%; (2) a report on the progress of the initiatives identified under section 3505(3), and (3) a report on the results of the reduction in burden associated with the review required by section 3503(3). The General Accounting Office is to submit a report by July 1, 1991 to the Senate Governmental Affairs and House Government Operations Committees assessing the overall effectiveness and attentiveness of OIRA and the agencies in meeting the responsibilities of the Act, together with recommendations for any steps necessary to better achieve those responsibilities. Within one year the Administrator must report to Congress, after consultation with other agencies and the Advisory Committee on Information Policy, on the feasibility and means of establishing a comprehensive inventory and authoritative register of all information dissemination products and services disseminated by the Federal Government, including whether an on-line service can best accomplish access to Government information.

Section 111. Consultation and Advisory Committees.

Section 3517 is amended to require the Administrator to provide timely opportunity for agencies and the public to comment on information collection requests and to consult with all interested parties, including advisory committees, on the development of information and statistical policies, plans, rules, regulations, procedures, and guidelines. The Administrator is directed to establish an Advisory Committee on Information Policy to advise in carrying out the functions assigned under section 3504(b), and an Advisory Committee on Statistical Policy to advise in carrying out the functions assigned under section 3504(d)(1).

Section 112. Public Disclosure and Reporting By the Office of Information and Regulatory Affairs.

Section 3518 establishes new public disclosure and reporting requirements on OIRA with respect to its reviews of the regulatory and nonregulatory activities of agencies. Section 3518(a) requires that OIRA establish and maintain a public file for each agency activity that it reviews as a consequence of the function assigned under the provisions of this chapter or undertaken under any other provision of law. The file must include copies of all written materials regardless of format which are received or provided by OIRA from or to a person who is not an employee of OMB; a list of all meetings with persons outside the Federal Government relating to a review activity; ongoing information about any submission, including the date of its submission, the name of the agency, the name and type of the agency submission and the review for which it was submitted, the name of any person in OIRA who is reviewing the submission, and the decision and the date it was made by OIRA; copies of any changes made as a result of recommendations by OIRA, including the reasons and authority for such changes; and an explanation of any approval, denial or disapproval of an information collection submission.

Section 3518(b) requires that OIRA establish and maintain a public file for each agency rulemaking activity submitted to it for review. The public file must be placed in OIRA's public reading room at the time the first document in the agency rulemaking activity is submitted to OIRA for review. The file must include copies of any drafts of advanced notice or notice of rulemaking; copies of any proposed or final rule; all written matter regardless of format that is exchanged between OMB and the agency conducting the rulemaking; all written material regardless of format received from persons outside the Federal Government concerning the agency rulemaking activities; and a list of all meetings attended by OIRA employees with persons outside the Federal Government relating to the agency rulemaking activity. At the end of each calendar month the Administrator must compile and place in the public reading room a list of all proposed or final rules submitted for review by OIRA together with the estimated length of review of each. The public file must also contain all written materials received from persons outside the Federal Government concerning any agency rulemaking not under review.

The Administrator is directed to send all appropriate agencies copies of written materials, regardless of format, concerning an agency rulemaking under review by OIRA that it receives from persons who are not employees of the Federal Government; to advise appropriate agencies as to the substance of all oral communications concerning an agency rulemaking activity under review by OIRA that it has with persons who are not employees of the Federal Government; and invite the appropriate agency heads to all scheduled meetings with persons who are not employees of the Federal Government concerning an agency rulemaking activity under review. Only the Administrator and the Deputy Administrator may communicate with any person who is not employed by the Federal Government on regulations submitted to OIRA for review. The period of review by the Administrator is limited to 30 days after the date of submission in the case of a nonmajor rule and 90 days in the case of a major rule . The period of review may be extended by the Administrator by no more than 30 days upon a determination by the Administrator that an extension is absolutely necessary. Regulatory completion dates established by statute or court order are not superceded by the review periods established by this section.

Section 113. Authorization of Appropriations.

An appropriation of $5,500,000 is authorized for fiscal year 1990 and $6,500,000 for fiscal year 1991.

Section 114. Technical and Conforming Amendments.

The table of sections for chapter 35 of the title 44 is amended to reflect the addition of new section 3518 and the renumbering of existing subsequent sections. The term "Administrator" is substituted for the term "Director" where appropriate throughout chapter 35.

Title II -- Commission on Federal Information

Section 201. Findings.

Congress finds that information is the infrastructure for decisionmaking and is vital to insure the efficient and effective operation of the Federal Government and an informed citizenry; that the Federal Government is an important provider of information both for its own use and for State and local governments, business and the public; that Federal information and statistical data has not kept pace with changes in the United States economy and society and may lack the ability to provide relevant information for future decisions; and that there are problems of quality and timeliness with Federal information and statistical data.

Section 202. Establishment of the Commission.

There is established a Commission on Federal Information.

Section 203. Functions of the Commission.

The Commission is directed to study and investigate statutes, policies, rules, regulations, procedures, and practices of the Federal Government relating to information gathering, processing, analysis and dissemination and to report to Congress and the President no later than July 1, 1991, its findings and recommendations for changes in current statutes, policies, rules, regulations, procedures, and practices. It may make such interim reports and recommendations as it determines desirable.

Upon submission of the Commission's final report OMB, in coordination with executive agencies, must take action to formulate the views of the executive branch agencies on the Commission's recommendation, implement those recommendations where practicable within the limits of authority and resources, and propose legislation to carry out those other recommendations in which such agencies concur. At least once every six months after the submission of the Commission's report OMB must report to Congress and the President the status of actions taken or to be taken, and within two years it must submit a final report of such actions to Congress and the President.

Section 204. Membership of the Commission.

The Commission is to be composed of sixteen members, including two Members of the Senate appointed by the President of the Senate; two Members of the House of Representatives appointed by the Speaker of the House of Representatives; the Director of OMB and two other officials or employees of the executive branch appointed by the President; two members from among officials of State and local governments appointed by the President; and seven members of the public, including information users and providers and other interested groups, to be appointed by the President. The Chairman and Vice Chairman are to be selected by Commission from among its members. The initial appointments are to be made within 60 days of enactment.

Section 205. Travel Expenses.

Members of the Commission will be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5 of the United States Code.

Section 206. Powers of the Commission.

The Commission or any subcommittee or member so authorized, may hold hearings, take testimony, receive evidence, and take oaths, as may be deemed desirable. The Commission may appoint necessary personnel without regard to the requirements of title 5, United States Code, and such personnel may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, but at a rate not to exceed the maximum rate authorized by the General Schedule. The Commission may also procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, but at rates not to exceed the daily equivalent of the annual basic pay in effect for the maximum rate authorized by the General Schedule. The Commission is authorized to hire private organizations and educational institutions to carry out such studies and prepare such reports as the Commission determines are necessary to carry out its duties.

Section 207. Cooperation With Federal Agencies.

Federal Agencies are authorized and directed to furnish the Commission with such data, reports, and other information not otherwise prohibited by law as requested by the Chairman. Agencies are authorized to provide such services as the Commission may request on such basis, reimbursable or otherwise, as may be agreed upon.

Section 208. Termination of the Commission.

The Commission terminates 120 days after it submits its final report.

Section 209. Authorization of Appropriations.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out its functions.

Title III -- Management of Public Records.

Section 301. Binding Regulations Concerning Public Records.

Section 3302 of title 44, dealing with the promulgation of regulations for the disposal of Federal records by the Archivist of the United States, is amended to reflect that such regulations are binding on all Federal agencies and to add provisions that direct the Archivist to promulgate standards for interpreting the definition of records under section 3301 and standards for establishment and maintenance of adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency for incorporating recordkeeping requirements to be issued by heads of agencies. Section 3102(3) of title 44, directing the heads of agencies to establish programs for the efficient and economical management of agency records, is amended to incorporate the requirement of compliance with the regulations promulgated pursuant to section 3302.

Section 2107, respecting the acceptance of records for historical preservation by the Archivist, is amended to authorize the Archivist or his designee, subject to the provisions of section 2906 and notwithstanding any other provision of law, to inspect or examine any agency record to determine if an agency is in compliance with the binding guidelines issued by the Archivist and whether such record has sufficient value to warrant its preservation.

Section 2906(a)(1), respecting the inspection by the Archivist and the Administrator of General Services of agency records and records management practices and programs, is amended to reflect that such inspections encompass their responsibilities under chapters 21, 31, 33, and 35, as well as chapter 29, and to authorize inspections to determine whether records in the custody of the agency have sufficient historical, administrative, legal, research or other value to warrant their further preservation.

Section 2906(a)(2) is amended to direct the Archivist and Administrator to promulgate regulations, subject to the approval of the President, to provide for the inspection of records, the use of which is restricted by law; and to provide that regulations authorizing and restricting the use of such records applicable to the head of the custodial agency or to employees of that agency are applied in the same manner to the Archivist and the employees of the National Archives and Records Administration, and the Administrator and the employees of the General Services Administration.

Section 3303a(a), respecting the examination of lists and schedules by the Archivist to determine whether records therein lack preservation value, is amended to incorporate the limitations of amended section 2906.

Section 302. Reports on Routine Uses.

Section 552a(r) of title 5, United States Code, respecting advance reports to congressional committees and OMB regarding proposed changes in systems of records or matching programs to permit evaluation of the probable or potential effect of the proposal on the privacy or other rights of individuals, is amended to add a proposed change in "routine use" as a matter for advance notification.

[Note: The text of the bill incorrectly refers to the Code section to be amended as 552a(t).]

Constitutionality of Public Disclosure and Accountability

(By Senator Bingaman)

The questions of whether the Congress has the authority to legislate public disclosure and accountability provisions over OMB as proposed in S. 1742 and whether it is a constitutionality infringement on executive branch decision-making are surely complex. I would like to submit for the record, a legal memorandum prepared by Morton Rosenberg of the American Law Division of the Congressional Research Service of the Library of Congress which I think rather convincingly and unequivocally answers these questions.

In a lengthy legal analysis, M. Rosenberg examines:

1) Is the legislation consistent with the historic prerogative of Congress in the administrative process, and to the key roles accorded to administrative procedures and judicial review in recent decades?

2) Are the public disclosure and accountability provisions of the legislation analogous to other statutory requirements or or procedures? To what extent have such measures served as a benefit to reviewing courts and to the public as a whole?

3) Does the legislation interfere with the constitutional authority of the President? To the extent you have found existing statutory requirements or procedures governing Federal rulemaking which are analogous to the ones proposed in S. 1742, do you believe that such measures have constituted an undue constraint of executive decision-making?

The analysis concludes that "the most recent pronouncements of the Supreme Court respecting Congress' authority to structure the administrative bureaucracy would appear to strongly support the constitutional validity of the public disclosure and accountability provisions proposed under S. 1742 against a claim of encroachment on or interference with the President's ability to carry out his constitutional functions."

The analysis further concludes that: "Application of this standard to the imposition on OIRA of the proposed disclosure and accountability requirement of S. 1742 would appear to raise no constitutional doubts as to its validity."

Finally, any argument that the administrative burden of the new requirements would be constitutionally onerous has been severely undermined by an agreement reached on November 17, 1989 between the Chairman and Ranking Minority member of the House Government Operations Committee and Director of OMB imposing substantially similar openness requirements on OIRA conduct of the regulatory review process. See 136 Cong. Rec. E3925 (daily ed., November 17, 1989). Under that agreement OIRA will establish dockets for all its review activities under E.O.'s 12291 and 12498 which will include all written materials between OMB and the agencies as well as lists of communications and between OIRA personnel and persons outside the government, and detailed explanations of actions taken by OIRA. Each docket will be available for public inspection and copying at the time of the publication in the Federal Register by the subject agency of either or of a notice of a final rule. The agreement also imposes specific time limits on OIRA review. The agreement is therefore evidence of the reasonableness of the requirements proposed by S. 1742."

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

February 21, 1990

TO : Honorable Jeff Bingaman, Chairman,
Senate Subc. on Government Information & Regulation,
Committee on Governmental Affairs
Attention: Steve Katz, Ed Jayne

FROM : American Law Division

SUBJECT : Legal and Historic Precedent Supporting Public Disclosure and Accountability Provisions in S.1742, The Federal Information Resources Management Act of 1989

S.1742, the Federal Information Resources Management Act of 1989, would amend the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (1982 and Suppl. V 1987), to impose public disclosure and accountability requirements and procedures on the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) with respect both to its regulatory review activities under Executive Order 12291 and its review of information collection activities by agencies under the Paperwork Act.

More specifically, Section 3518 would establish new public disclosure and reporting requirements on OIRA with respect to its reviews of the regulatory and nonregulatory activities of agencies. Section 3518(a) requires that OIRA establish and maintain a public file for each agency activity that it reviews as a consequence of the function assigned under the provisions of this chapter or undertaken under any other provision of law. The file must include copies of all written materials regardless of format which are received or provided by OIRA from or to a person who is not an employee of OMB; a list of all meetings with persons outside the Federal Government relating to a review activity; ongoing information about any submission, including the date of its submission, the name of the agency, the name and type of the agency submission and the review for which it was submitted, the name of any person in OIRA who is reviewing the submission, and the decision and the date it was made by OIRA; copies of any changes made as a result of recommendations by OIRA, including the reasons and authority for such changes; and an explanation of any approval, denial or disapproval of an information collection submission.

Section 3518(b) requires that OIRA establish and maintain a public file for each agency rulemaking activity submitted to it for review. The public file must be placed in OIRA's public reading room at the time the first document in the agency rulemaking activity is submitted to OIRA for review. The file must include copies of any drafts of advanced notice or notice of rulemaking; copies of any proposed or final rule; all written matter regardless of format that is exchanged between OMB and the agency conducting the rulemaking; all written material regardless of format received from persons outside the Federal Government concerning the agency rulemaking activities; and a list of all meetings attended by OIRA employees with persons outside the Federal Government relating to the agency rulemaking activity. At the end of each calendar month the Administrator must compile and place in the public reading room a list of all proposed or final rules submitted for review by OIRA together with the estimated length of review of each. The public file must also contain all written materials received from persons outside the Federal Government concerning any agency rulemaking not under review. The Administrator is directed to send all appropriate agencies copies of written materials, regardless of format, concerning an agency rulemaking under review by OIRA that it receives from persons who are not employees of the Federal Government; to advise appropriate agencies as to the substance of all oral communications concerning an agency rulemaking activity under review by OIRA that it has with persons who are not employees of the Federal Government; and invite the appropriate agency heads to all scheduled meetings with persons who are not employees of the Federal Government concerning an agency rulemaking activity under review. Only the Administrator and the Deputy Administrator may communicate with any person who is not employed by the Federal Government on regulations submitted to OIRA for review. The period of review by the Administrator is limited to 30 days after the date of submission in the case of a nonmajor rule and 90 days in the case of a major rule . The period of review may be extended by the Administrator by no more than 30 days upon a determination by the Administrator that an extension is absolutely necessary. Regulatory completion dates established by statute or court order are not superceded by the review periods established by this section.

In addition, new section 3506(d) provides for the establishment by each agency of a public file for each function required by this chapter which involves review of an agency activity, or any other function involving review (not specifically authorized by this chapter), by the Office of Information and Regulatory Affairs. The file must include with respect to each activity under review (1) copies of all written materials regardless of format which the agencies provide to or receives from the Office of Information and Regulatory Affairs; (2) information about such agency submissions including the date of the submission, the nature of the activity with respect to which the submission is made, and the name of OIRA official to whom it is submitted; and (3) copies of all changes in the agency activity made as a result of OIRA recommendations.

With respect to this proposed statutory scheme you have requested elaboration of its rationale and support in the context of the following questions:

(1) Is the legislation consistent with the historic prerogative of Congress in the administrative process, and to the key roles accorded to administrative procedures and judicial review in recent decades?

(2) Are the public disclosure and accountability provisions of the legislation analogous to other statutory requirements or procedures? To what extent have such measures served as a benefit to reviewing courts and to the public as a whole?

(3) Does the legislation interfere with the constitutional authority of the President? Have existing statutory requirements or procedures governing Federal rulemaking analogous to the ones proposed in S.1742 constituted an undue constraint on executive decision-making?

In response, the discussion will proceed as follows. First, a brief description is presented of the judicial development of the practice and theory underlying informal rulemaking under Section 553 of the Administrative Procedure Act (APA). This review sheds light not only on the nature and scope of agency obligations when it undertakes decisionmaking by means of rulemaking, and the role of the courts in policing that activity, but also, because this development was essentially complete by 1980, clarifies the understanding of the framers of the original Paperwork Act with respect to how those requirements were to apply to OIRA when it dealt with information collection requirements contained in rules. Section 2 treats the understanding of Congress as to how rulemaking that concerned information collection was to be dealt with under the Paperwork Act and Section 3 follows with a description of how the procedures of the Paperwork Act and those of E.O. 12291 have been meshed and the manner in which they have operated together in practice. As requested, section 4 presents historical and other justifications for imposing the proposed public participation, public disclosure, and delay prevention requirements on the regulatory review process. Section 5 concludes with an analysis supporting the constitutionality of imposing such requirements on OIRA.

1. *Informal Rulemaking Under the APA*

Informal rulemaking under the APA, 5 U.S.C. 553 (1988), requires that an agency publish a notice of proposed rulemaking in the Federal Register, afford interested persons an opportunity to participate in the proceeding through the submission of written comments or, at the discretion of the agency, by oral presentations, and, when consideration of the relevant matter presented is completed, incorporate in the rules adopted "a concise general statement of their basis and purpose." 5 U.S.C. 553(b). A final rule must be published in the Federal Register "not less than 30 days before its effective date." 5 U.S.C. 553(d). Interested persons have the right to petition for the issuance, amendment or repeal of a rule. 5 U.S.C. 553(e).

Since the 1960's the courts have forcefully encouraged the greater use of rulemaking for elaborating policy and have radically transformed the ways in which agencies make rules and courts review them. Led by the Court of Appeals for the District of Columbia, creative judicial interpretation of the APA and of the agencies' organic statutes has made the rulemaking process more accessible and procedurally formal. See generally, De Long, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257 (1979); Pederson, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975). First, the courts lowered the barriers to public access to both agencies and courts by relaxing the standing, ripeness, and exhaustion rules. See. *e.g., Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970)(standing); *Gardner v. Toilet Goods Assoc.*, 387 U.S. 167 (1967); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967)(ripeness). Next, the courts sought to ensure that such access was meaningful. This was accomplished by adding substance to the spare and cryptic notice and comment requirements of section 553. The courts now require a rulemaking record which must contain the material on which the agency bases its decision. *E.g., United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977). Use of nonrecord material in a final statement of basis and purpose is cause for remand. *National Ass'n. of Demolition Contractors v. Costle,* 565 F.2d 748, 752 (D.C. Cir. 1977). Interested persons must be allowed the opportunity to test the bases of the agency's position -- factual, technical, analytical or theoretical. See, *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Mobil Oil Corp. v. FPC,* 483 F.2d 1238, 1259-60 (D.C. Cir. 1973). Finally, the courts have imposed a series of requirements on the final statement of basis and purpose. The statement must identify the major issues in the proceeding, show the agency's reasoning on those issues, and establish that the agency has indeed identified and taken a hard look at all the relevant factors. *Automotive Parts Accessories Ass'n. v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968); *United States v. Nova Scotia Food Prod. Corp., supra*, 568 F.2d at 252-53.

Agencies have also been held obligated to answer cogent comment and to do so in terms of the particular record in preparing the final statement. *Office of Communications of the Church of Christ v. FCC*, 560 F.2d 529, 532-33 (2d Cir. 1977). A significant part of the statement's function is seen as responding to public comments and explaining how the agency resolved the problems raised. The obligation to respond to serious objections may even extend to criticisms that might have been made, but were not. The agency itself may have to refute serious arguments against its positions or contentions. *State Farm Mutual Automobile Ins. Co. v. Dept. of Transportation,* 680 F.2d 206, 228-30 (D.C. Cir. 1982), aff'd *sub. nom., Motor Vehicle Mnfrs. Assoc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29 (1983).

In essence, then, the courts now seek to ensure that agencies listen and respond to citizen comments by reading the "concise and general statement" language of the APA as a requirement that they conduct a dialogue with the public and that the agency's statement contains responses to the comments received. The point of the dialogue is that if the agency must respond to comments, it must listen to the comments. Thus the courts have forced agencies to grant real access to the public by demanding that the agency prove it has listened by responding in detail to what the public has said to it.

Finally, these requirements for greater public access and procedural formality have been accompanied by more exacting review of substantive agency decisions. The very label used to describe modern review of judicial rulemaking -- the "hard look doctrine" -- captures the sense of transformation just described. Reviewing courts apparently are no longer content to affirm based upon the intuitive plausibility of the link between the policy announced and the statutory standard. An agency must be prepared to demonstrate the superiority of the choice made over others advanced by outside participants or conceived by the agency itself. To enforce that requirement courts examine, often in painstaking detail, the agency's factual predicate, analytical methodology, and chain of reasoning. *State Farm Mutual Automobile Ins. Co. v. Dept. of Transportation, supra; Aqua Slide 'N' Dive v. CPSC,* 569 F.2d 831, 837-38 (5th Cir. 1978); *Ethyl Corp. v. EPA,* 541 F.2d 1, 34-46 (D.C. Cir. 1975), *cert. denied* 426 U.S. 941 (1976); *South Terminal Corp. v. EPA,* 504 F.2d 646, 665-66 (1st Cir. 1974).

Even the delayed effectiveness requirement of section 553(d) has been seen as an integral part of this scheme to assure meaningful and effective public participation in the policy determination process. In *Ngou. v. Schweiker,* 535 F. Supp. 1214, 1216 (D.D.C. 1982), the court noted that "the 30-day notice requirement, like the notice and comment procedures prescribed in sections 553(b) and (c), is designed to ensure adequate public participation in the rule-making process." The court in *Kelly v. United States Department of Interior,* 339 F. Supp. 1095, 1102 (E.D. Calif. 1972), elaborated more fully on the importance of continued public involvement during the delayed effectiveness period:

> We believe that the 30-day notice rule serves an important interest, the right of the people to present their views to the government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decisionmaking and promotes greater responsiveness to the needs of the people, especially in cases such as this where Congress has only roughed in its program. Indeed, a meaningful pre-publication dialogue between plaintiffs and the Secretary may have even avoided this lawsuit.

The linkage between the delayed effectiveness provision and the public participation requirements of 553(b) and (c) is amply supported by the legislative history of the APA. This is made clear in the committee reports by the emphasis that the 30 day delay is only meant to be a minimum period and may be extended when circumstances warrant; that the period of delay is to serve the dual purpose of allowing time for the public to prepare for the new requirements and "to take any other action which the issuance of the rule may prompt"; and that the "good cause" exemption of the provision is to be narrowly construed. House Report No. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* Administrative Procedure Act: Legislative History, Senate Committee on the Judiciary 259-60 (1946)(APA Legislative History). Accord, Senate Report No. 752, 79th Cong., 1st Sess. (1945), APA Legislative History at 201 ("This subsection does not provide procedures alternative to notice and other public proceedings required by prior subsections of this section.") See also, *Hotch v. United States,* 212 F.2d 280 (9th Cir. 1954); *Ngou v. Schweiker,* 535 F. Supp. 1214, 1216 (D.D.C. 1982); *Sannon v. United States,* 458 F.Supp. 467 (S.D. Fla. 1978); *City of New York v. Diamond,* 379 F. Supp. 503, 517 (S.D.N.Y. 1974)("The Act gives 'interested persons an opportunity to participate in the rulemaking' *before* the proposed rule becomes effective."); *Kelly v. U.S. Department of Interior,* 339 F. Supp. 1095 ("[T]he clear purpose of the 30-day rule [is] to afford interested persons an opportunity for airing their views *before* the regulation is officially adopted.") But *c.f. United States v. Gavrilovic,* 551 F.2d 1099, 1104 n.9 (8th Cir. 1977).

Despite this revolutionary judicial transformation of the informal rulemaking process, the absence of any proscription in section 553 of *ex parte* contacts has led the courts to refuse to impose a blanket prohibition against such communications. *Sierra Club v. Costle,* 657 F.2d 298, 401-02 (D.C. Cir. 1981). At the heart of that reluctance has been the recognition that informal rulemaking is closely akin to the legislative process and, as in that process, communications and interactions between agencies and affected persons are a vital means of general policy development: "[T]he importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur provision of information which the agency needs." *Id.* at 401.

Several important points should be emphasized at this juncture. First, the judicial development of law of *ex parte* communications in informal rulemaking occurred *prior* to the promulgation of E.O. 12291 in 1981 and never considered the factor of a centralized, pre-publication presidential review mechanism such as that presented by the Order. Indeed, there has been no direct judicial consideration of that issue to date. Second, even though the courts have refused to issue a general proscription against *ex parte* contacts, they have acknowledged that "[t]he possibility of course exists that in permitting *ex parte* communications with rulemakers we create the danger of 'one administrative record for the public and this court and another for the Commission'." *Id.* at 401, quoting *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 54 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). As a consequence, the courts have left open the possibility that they will intervene in situations where such contacts undermine the fairness and integrity of the process. Thus in the *Home Box Office* case the court noted that "[W]e recognize that informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness. Reconciliation of these considerations in a manner which will reduce procedural uncertainty leads us to the conclusion that communications which are received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file. *Of course, if the information contained in such a communication forms the basis for agency action, then under well established principles, that information must be disclosed to the public in some form.*" 567 F.2d at 57 (emphasis supplied). See also *United Steel Workers of America v. Marshall*, 647 F.2d 1189, 1237-38 (D.C. Cir. 1980)(interpreting the *Home Box Office* as applying to "important communications that may have influenced the agency decisionmaking", where "massive evidence" existed of secret lobbying, and the court was concerned that "independent discretion" of individual commissions had not been exercised); *Action for Children's Television v. FCC*, 564 F.2d 458, 476 (D.C. Cir. 1977).

The *Sierra Club* decision also presents recognition that court intervention may be required in individualized instances. In that case the statute in question required the docketing of all documents "of central relevance to the rulemaking." At issue were post-comment period oral communications which were not docketed. The court agreed that "in some instances" it would require at least some adequate summary in order to preserve the integrity of the rulemaking docket. The court explained:

> ... This is so because unless *oral* communications of central relevance to the rulemaking are also docketed in some fashion or other, information central to the justification of the rule could be obtained without ever appearing on the docket, simply by communicating it by voice rather than by pen, thereby frustrating the command of section 307 that the final rule not be "based (in part or whole) on any information or data which has not been placed in the docket...."

Sierra Club, 657 F.2d at 402 (emphasis in original).

The *Sierra Club* court also expressed concern over the problem of "conduit" contacts by private, nongovernmental interests to agencies through the White House and cited with approbation the position of the Department of Justice at that time deeming such actions improper.

> In this case we need not decide the effect upon rulemaking proceedings of a failure to disclose so-called "conduit" communications, in which administration or inter-agency contacts serve as mere conduits for private parties in order to get the latter's off-the-record views into the proceeding. EDF alleges that many of the executive comments here fell into that category. Brief for Petitioner EDF at 21, 29, 43. We note that the Department of Justice Office of Legal Counsel has taken the position that it may be improper for White House advisers to act

> as conduits for outsiders. It has therefore recommended that Council of Economic Advisors officials summarize and place in rulemaking records a compilation of all written or oral comments they receive relevant to particular proceedings. *See* Office of Legal Counsel, Department of Justice, Memorandum for Hon. Cecil D. Andrus, Secretary of Interior, Re: Consultation With Council of Economic Advisers Concerning Rulemaking Under Surface Mining Control and Reclamation Act (undated), *reprinted in Legal Times of Washington,* January 29, 1979, at 32-3.

Id. at 405 n. 520. The court also cited with approval the recommendation of the Administrative Conference of the United States (ACUS) that agencies docket all written communications received by agencies after publication of a notice of proposed rulemaking, and that agencies "should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules." *Id.* at 403, reproducing ACUS Recommendation 77-3, 1 CFR 205.77-3 (1980).

In sum, then, at the time of the enactment of the Paperwork Reduction Act in 1980 Congress legislated against the backdrop of the full judicial development of a participatory, adversarial informal rulemaking process. There is no evidence in the record that Congress foresaw a central regulatory review mechanism of the type subsequently established by President Reagan in 1981. The procedure established by the Paperwork Act for information collection requirements established by informal rulemaking reflects this contemporaneous knowledge.

2. *Rulemaking Under the Paperwork Act*

The text and legislative history of section 3504(h) of the Paperwork Act evidences the understanding of, and the intent to adopt, the openness and participatory concepts developed by the courts for informal rulemaking at that time. First, it is clear that the process prescribed does not necessarily contemplate pre-publication review by OMB. Rather, review was to take place as part of the normal notice and comment process. Thus, 3504(h)(1) directs agencies to submit rules which contain information collection requirements to OMB "as soon as practicable, but no later than publication of a notice of proposed rulemaking in the Federal Register." The intent of the public nature of the review, however, is manifested by section 3504(h)(2) which provides that OMB may comment publicly on a collection of information requirement within 60 days after an agency publishes a proposed rule containing the requirement. If OMB fails to make any such comment, the Act bars OMB from disapproving the requirement. Section 3504(h)(4). If OMB comments and the agency's response in the final rule is unreasonable, OMB may disapprove the requirement if it acts within 60 days after the publication of the final rule in the Federal Register. Section 3504(h)(5)(C). If the agency fails to provide the required notice of rulemaking to OMB or if the agency substantially changes the proposal in the final rule without giving OMB a further opportunity to comment, OMB may disapprove the requirement at its discretion. Section 3504(h)(5).

Section 3504 is a product of Senator Kennedy's unease with what he perceived to be an unwarrantedly broad grant of veto power over information collection regulations in the reported bill. His explanation of the purpose of his amendment provides a strong argument that OMB's power to disapprove such regulations was limited to the confines of the notice and comment process. In Senator Kennedy's view, the defect with the reported bill was that it allowed OMB to veto agency regulations after they had been adopted by an agency pursuant to public notice and comment, without providing any procedural rights to either the public or to the agency involved. 126 Cong. Rec. 30,178 (1980). To allow OMB to overturn an agency rule without having to justify the decision publicly would violate "basic notions of fairness upon which the Administrative Procedure Act is based, as well as concepts of due process embodied in the U.S. Constitution." *Id.* According to Senator Kennedy, his amendment was designed to deal with these concerns by "limit[ing] the authority of OMB to overturn reporting, recordkeeping, and other information collection requirements adopted by a Federal agency in a rulemaking proceeding ... [and] establish[ing] a procedural scheme which governs OMB's relationship with the Federal agencies." *Id.* The amendment also effectively limited OMB's power to veto an agency's recordkeeping and reporting requirements to only those circumstances in which OMB finds the agency's response to its comments unreasonable. *Id.*

Thus it would appear clear that the paperwork review process contemplated by the 1980 Act was one that would parallel the public notice and comment process. In practice, however, it has operated quite differently.

3. *Paperwork Review and Executive Order 12291.*

In February 1981 President Reagan issued E.O. 12291, 3 CFR 323 (1985). The order built upon President Carter's regulatory reform order, E.O. 12044, 3 CFR 152 (1978), but went significantly further both substantively and procedurally. Substantively, the Order created a new general requirement that executive agencies not undertake regulatory action unless the benefits to the public outweigh the costs, and that executive agencies select regulatory alternatives which maximize benefits. Procedurally, the Order continued the Carter order's requirement that agencies prepare regulatory impact analyses, *i.e.*, cost-benefit justifications, of major rules, but added the requirement that agencies send all proposed and final rules to OMB for review before publication. OMB then reviews the proposed rule, and later the final rule, for compliance with the Order. While the Order does not purport to give OMB authority to override any determinations made by an agency, it does require agencies to delay publication of proposed rules pending the completion of OMB's review and to delay publication of final rules until the agency has responded to OMB's views. Also, OMB is authorized to require the agency to consider additional relevant data from any appropriate source. Finally, the Order instructs OMB to coordinate provisions of the Order with the requirements of the Paperwork Act.

E.O. 12291 provides no mechanism for public comments to OMB on proposed or final rules under consideration. Indeed, no formal mechanism exists by which the public even knows when a proposed or final rule is submitted to OMB. Interested persons become aware of such submissions either from sources within the agencies, from the trade press, or from requests for their views by OMB. The bulk of communications by OMB with agencies and third parties under the Order is oral. The Order does not require reduction of these communications to writing and OMB has been reluctant to do so. Objection to the E.O. 12291 review process have been well rehearsed in congressional hearings and scholarly commentary and has centered on the problems of undue delay in the processing of regulations; alleged displacement of the agency decisionmakers designated by Congress to make the ultimate policy decisions involved; the question of the application of impermissible criteria or factors, *e.g.*, cost-benefit, in the agency decisionmaking process; the allowance of *ex parte* contacts between OMB and the agencies and conduit contacts from nongovernmental interests to the agencies through OMB; and the claim that the process undermines meaningful public participation and effective judicial review of informal rulemaking because of the aforementioned "secret" inputs and the extraneous pressures that OMB may bring to bear on agencies. See generally, Cooper and West, Presidential Power and Republican Government: The Theory and Practice of OMB Review of Rules, 50 J. of Politics 864 (1988); Rosenberg, Regulatory Management At OMB, *in* Office of Management and Budget: Evolving Roles and Future Issues, Sen. Comm. on Governmental Affairs, 99th Cong. 2nd Sess. 185-233 (1986)(S.Prt. 99-134).

In practice, OMB has not utilized the procedure prescribed by section 3504(h) of the Paperwork Act but has instead consistently resorted to the non-public processes of E.O. 12291. As Professor William Funk explains, this effectively defeats the purpose of the Kennedy Amendment but does not technically violate it:

> Obviously, this procedure differs from the process envisioned in section 3504(h) for proposed rules containing collection of information requirements. OMB need not, and does not, follow the procedure in that section in its review of executive branch regulations containing collection of information requirements. Rather than make public comments on the proposed rule during the normal comment period, OMB makes private comments to the agency pursuant to its E.O. 12,291 review prior to publication of the proposed rule and then again between the end of the public comment period and publication of the final rule. Moreover, OMB's ability to delay indefinitely publication of

either a proposed or final executive branch rule amounts to the substantive power to deny approval on any basis OMB chooses. OMB withholds both the fact of denial and the bases for it from the public.

OMB thus avoids the Kennedy Amendment when reviewing collection of information requirements for proposed regulations. This avoidance of the Kennedy Amendment does not mean that OMB disregards the Amendment. The Kennedy Amendment was written to limit substantively the powers given to OMB by the Paperwork Reduction Act with respect to collection of information requirements and to require OMB's exercise of *these* powers to be carried out pursuant to the procedures of section 3504(h). The Kennedy Amendment did not address OMB's exercise of power over regulations pursuant to authority other than the Paperwork Reduction Act. Under E.O. 12,291, OMB is able to influence executive branch regulations generally without public scrutiny of its influence. Regulations imposing paperwork requirements are only a small subset of the regulations covered by the Executive Order, and the review of that subset under the Order does not require the exercise of any powers granted to OMB by the Paperwork Reduction Act. Consequently, OMB's use of E.O. 12,291's procedures for executive branch regulations imposing reporting or recordkeeping requirements raises no more questions than its use of those procedures generally for executive branch regulations.

OMB's use of E.O. 12,291 rather than section 3504(h) to influence or control regulations containing reporting or recordkeeping requirements should be disturbing to those who saw section 3504(h) as a means of assuring the possibility of meaningful public participation in decisions regarding collection of information requirements. Equally disturbing is the fact that OMB's penchant for non-public decision making appears to extend beyond collection of information requirements. The Kennedy Amendment's attempt to ensure public participation was not limited to collection of information requirements and section 3504(h). The amendment also built upon the requirement already established in section 3507(a)(2) that agencies publish in the *Federal Register* a notice of submission to OMB of any information collection request. The Kennedy Amendment required that, in reviewing information collection requests, OMB provide "interested agencies and persons early and meaningful opportunity to comment." Moreover, the Amendment required that OMB's decision to approve or disapprove an agency's information collection request be made publicly available.

> Together these provisions suggest, if not mandate, a significant opportunity for involvement by interested persons and agencies in decisions concerning information collection requests. While the public procedures applicable to information collection requests are not as comprehensive as those available for collection of information requirements in notice-and-comment rulemakings, the procedure applicable to requests does not create a strictly two-party relationship between the agency and OMB.
>
> OMB's regulations implementing the Act appear to reflect an acceptance of this public involvement, but in practice OMB has shown little interest in ensuring that agencies comply with the provisions regarding public participation in either its regulations for the Act. For example, OMB's regulations require that agencies send their notice of a submission of an information collection request to the *Federal Register* not later than the date of the submission to OMB. In this way, the public will be informed of a submission in time to have a meaningful opportunity to comment. OMB, however, is lax in enforcing this requirement, and it is often violated. It is not rare for a collection to be approved by OMB before the notice of its submission is even published. While a means to police the requirement is readily available to OMB, OMB prefers to wait to receive complaints before acting.

Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv. J. of Legis. 1, 94-96 (1987)(footnotes omitted).

4. *Justifications for Imposing Public Participation, Public Disclosure, and Delay Prevention Requirements on the E.O. 12291 Process*

The foregoing review would appear to amply support the value, if not the necessity, of actually integrating the regulatory review process of E.O. 12291 with the APA's informal rulemaking procedures. Over eight years of experience under the Order has arguably supplied considerable evidence that such review can have a significant impact on the substance of any proposal that is ultimately presented for public comment, an impact that may effectively be irrevocable in view of OMB's substantial political resources that may be brought to bear in the prepublication stage, and the "second bite" it has before it can be published as a final rule. It may be argued, then, that if this does not make the public comment period a "sham", it certainly diminishes its public perception as a meaningful opportunity to influence the formulation of agency policy. Sunshine provisions could go far in ameliorating this problem and also could effectively close the Paperwork Act loophole discovered by OMB and force a return to the process originally intended.

In addition to diminishing the value of public participation, secret OMB and White House communications can be seen as impairing the quality of judicial review. In *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), the Supreme Court held that the APA's arbitrary and capricious standard of review requires courts to conduct a "searching and careful" inquiry based on "the full administrative record that was before the [agency official] at the time he made his decision." 401 U.S. at 416, 420. Secret, unreported communications that nevertheless play a vital role in the agency's decision prevent courts from performing effectively the searching review contemplated by *Overton Park.*

This would appear to be a particularly telling point with respect to so called conduit contacts, through which the President or his advisers relay the views of private parties to agency officials. Nongovernmental interests, recognizing that Executive Order 12291 has created a new point of access to the decision-making process, have utilized the White House or the OMB as a conduit for their views, thereby influencing, perhaps covertly, agency rulemaking. In such instances there is usually no public knowledge of the contact or of what was communicated. Commentators have been especially troubled by the prospect of the President, in effect, lobbying on behalf of private parties. Professor Verkuil, for example, has expressed concern for the integrity of the governmental process:

> ...when White House actions reflect the interests of private industry in emphasizing a cost-minimization regulatory policy. Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve equivalent clout. The expressed fear is that government regulation will be co-opted by private groups through the intercession of the White House.

Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts By The White House, 80 Colum. L.Rev. 943, 950-51 (1980). Because private parties can always communicate directly with an agency, the White House serves only to magnify the influence of interested private parties who seek a particular result in rulemaking proceedings. It is not difficult to conclude that Congress did not intend the informality of the APA's rulemaking provisions to legitimize behind-the-scenes favoritism.

A requirement that all White House or OMB communications with agencies regarding a proposed rule prior to Federal Register publication or during the pendency of rulemaking proceedings be accompanied by disclosure of relevant communications from interested private parties received by the President or his advisers would seem to place a check on this potential for abuse. Such a requirement also emphasizes that the relevant agency, not the White House or OMB was meant to be the primary forum for communication of technical data, policy views, and legal arguments. By making agencies and the public aware of the source of information and arguments presented by the

President and his advisers in rulemaking proceedings, the requirement should ensure that no undue weight is given to the views of interested parties with allies in the White House.

Although one may consider overly broad a general disclosure requirement applicable to White House policy communications, obvious problems would arise in applying a more limited conduit communication disclosure rule. The difficulty lies in distinguishing between policy positions of private parties and those of the White House: The President and his advisers might adopt as their own the views privately urged by interested parties. Despite this ostensible classificatory dilemma, it is arguably undesirable to limit a conduit contact disclosure rule to material factual information. First, the possibility that the White House will lend its credibility to a private position due to mere favoritism exists with regard to policy and legal arguments as well as to factual information. Second, interested parties must rebut and reviewing courts must scrutinize not only the factual data presented in rulemaking proceedings, but also the policy and legal arguments that an agency has considered. Finally, a rule requiring that White House comments on proposed rules be accompanied by disclosure of private communications received by the President and his advisers during the pendency of the rulemaking proceeding will not unduly constrain expressions of White House policy to agency decision-makers: Presidential aides remain free both to communicate their own views and to endorse the views of private parties.

The Administrative Conference has unequivocably endorsed the public disclosure of conduit contacts, written or oral, by OIRA: "The officer responsible for presidential review of rulemaking should not allow the process of review to serve as a conduit to the rulemaking agency for unrecorded communications from persons outside the government." ACUS Recommendation No. 88-9, February 2, 1989, 1 CFR 305.88-9, sec. 6 (1989). Professor Harold Bruff, whose study underlies the ACUS recommendations, also supports the creation of a public file which includes all written communications between OIRA and the agencies. See Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533, 586-88(1989).

Viewing the regulatory review process as an integral, perhaps inextricable, part of the APA's informal rulemaking mechanism would appear far from anomalous. It is, arguably, inappropriate to analogize OMB's role in the pre-publication rule development stage to that of industry, labor or other private interests that an agency may -- legitimately -- meet with and exchange -- in private --ideas, information and views which need not be placed in the public record. The difference lies simply in the nature of OMB's interest and the significant influence it may exercise to ensure that its views are respected. In the one case Congress foresaw and encouraged private contacts. In the other it has, as yet, not. In either event, it is the agencies to whom Congress has vested the ultimate determination of how legislative policy shall be implemented. It is presumed that those agencies can withstand the importuning of private interests. It is not so clear that this is always possible when a presidential agent is involved. Integrating regulatory review as part of the public rulemaking process arguably is not likely to diminish presidential influence; but it could well restore the perceived values of integrity and fairness of the agency policymaking process.

5. *OMB, the APA, and the Constitution*

It is well settled that Congress in legislating pursuant to the powers granted it under Article I, section 8 of the Constitution, as well as powers granted in other parts of the Constitution, has the authority, under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to create the bureaucratic infrastructure of the Executive branch and to determine the nature, scope, power and duties of the offices so created. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). Moreover, as a general matter, the Supreme Court has spoken very broadly of the legislative power over offices. Where Congress deals with the structure of an office -- its creation, location, abolition, powers, duties, tenure, compensation and other such incidents -- its power is virtually plenary. See, *e.g.*, *Crenshaw v. United States*, 134 U.S. 99, 105-6 (1890); *Morrison v. Olson*, 108 S.Ct. 2597 (1988); *Mistretta v. United States*, 109 S.Ct. 647. Only where the object of the exercise of the power is clearly seen in the particular situation as an attempt to effect an unconstitutional purpose, *e.g.*, congressional appointment or removal of an officer, have the courts felt constrained to intervene. See, *Buckley v. Valeo*, *supra*; *Bowsher v. Synar*, 478 U.S. 714 (1986). The power to vest authority in agencies to engage in substantive rulemaking and to establish the procedures by which it will be carried out falls well within the congressional prerogative.

In exercising this authority, Congress has established the basic procedure to be followed, 5 U.S.C. 553, but has directed in certain instances that special procedures, so-called "hybrid rulemaking," be followed by certain agencies. See, *e.g.*, 15 U.S.C. 57a (1988) (Federal Trade Commission); 15 U.S.C. 2056, 2058-60 (1988) (Consumer Product Safety Commission); 15 U.S.C. 2605, 2618 (1988) (Environmental Protection Agency). Agencies have been required to place verbatim records or summaries of *ex parte* contacts in the rulemaking record, 15 U.S.C. 57a(c)(5)(1988) (Federal Trade Commission), as well as establishing public dockets that contain all documents "of central relevance". 7607(d)(4)(B)(i)(1982) (Environmental Protection Agency). Indeed, the latter statute prohibits the promulgation of any rule "based (in whole or in part) on any information or data which has not been placed in the docket as of the data of such promulgation. *Id.* at (d)(6)(C). Also, Congress often directs that rulemaking be accomplished by a specific deadline. See, *e.g.*, 42 U.S.C. 6924(c)(2) (1982 & Suppl. V 1987) (EPA); 42 U.S.C. 9605(b)-(c) (1982 & Suppl. V 1987) (EPA); 29 U.S.C. 655(a) (1982 & Suppl. V 1987) (Department of Labor).

OMB, itself a creature of the Congress, has never been deemed constitutionally immune from congressional adjustment and tailoring of its mission, powers, or the manner in which it operates. A brief resume of a variety of actions taken by Congress to modify powers it delegated to OMB is instructive. Some background on the agency is useful, however. Prior to the passage of the Budget and Accounting Act of 1921, 42 Stat. 20 (1921), which established the President's authority over the agency budget process, each agency had submitted its annual budget request directly to Congress. Finding this process inefficient and unwieldy, Congress created the Bureau of the Budget (now the Office of Management and Budget) to review the morass of agency budgetary information and to approve agency budget requests. See generally, L. Fisher, Presidential Spending Power, ch. 1 (1975). In addition to authority to review and approve agency budget requests, the Bureau was subsequently authorized to clear proposals for legislation or agency comments on proposed legislation. *See* Reorganization Act of 1939, ch. 36, tit. II, 53 Stat. 565 (codified at 31 U.S.C. 1108 (1982)).

However, Congress' voluntary relinquishment of this authority has not been unequivocal. Either House may request an agency official to submit directly to it "an appropriation estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government." 31 U.S.C. 1108(e)(1982). Also, Congress has selectively required simultaneous or unaltered submission of budget requests and legislative proposals and comments that limit review by OMB of budget requests, legislative proposals, review of proposed agency rules, and other required reports and documents. Thus, since 1973, Congress has mandated that the budget requests of the U.S. Postal Service, *see* Act of June 30, 1974, Pub. L. No. 93-328, § 23, 88 Stat. 287 (codified at 39 U.S.C. §2009 (1982)), and the U.S. International Trade Commission, *see* Trade Act of 1974, Pub. L. No. 93-618, § 175(a)(1), 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2232 (1976)), be submitted to Congress without revision, and that the budget requests and legislative proposals of other agencies be submitted concurrently to OMB and the Congress.[1] Also, Congress has exempted the Securities and

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[1] *See, e.g.*, Privacy Act of 1974, Pub. L. No. 93-579, S 5(a)(5), 88 Stat. 1896 (reprinted in 5 U.S.C. § 552a App., at 318 (1976) (Privacy Protection Study Commission); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 101(a)(3), 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 4a(h)(1)-(2)(1982)) (Commodity Futures Trading Commission); Consumer Product Safety Act, Pub. L. No. 92-573, § 27(k), 86 Stat. 1207 (1972) (codified at 15 U.S.C. § 2076(k) (1982) (Consumer Product Safety Commission); Hazardous Materials Transportation Act, Pub. L. No. 93-633, § 304(b)(7), 88 Stat. 2156 (1975) (codified at 49 U.S.C. § 1903(b)(7)(1982)) (National Transportation Safety Board); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122 (codified at 5 U.S.C. § 1205(j)(1982) (Merit Systems Protections Board); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 311, 90 Stat. 60 (codified at 31 U.S.C. § 1108(f)(1982)) (Interstate Commerce Commission); Department of Energy Act, Pub. L. No. 95-91, § 401, 91 Stat. 582 (codified at 42 U.S.C. § 717(j)(1982))(Federal Energy Regulatory Commission); AMTRAK Improvement Act of 1973, Pub. L. No. 93-146, § 12, 87 Stat 553 (codified at 45 U.S.C. § 601(d)(1976) (National Railroad Passenger Corporation); Regional Rail

Exchange Commission, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and the National Credit Union Administration from OMB clearance of their legislative proposals and comments. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500 (codified at 12 U.s.C. §250 (1982)). OMB also has been precluded from imposing E.O. 12,291 review on Agricultural Marketing orders of the Department of Agriculture or regulations of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department. Executive Office Appropriations Act, 1987, as included in Public Laws 99-500 and 99-591, section 101(m). OMB may review reports to Congress required of the Secretary of Health and Human Services but it may not revise them or delay their timely submissions. 42 U.S.C. 242m(a)(3)(1982). Reports and documents required by Congress of the Inspector General of the Department of Energy need no clearance or approval beyond the Secretary of Energy or Federal Energy Regulatory Commission. 42 U.S.C. 7138(f)(1982). And no clearance is required for reports of the Chief Counsel of the Office of Advocacy of the Small Business Administration. 15 U.S.C.A. 634 (1989 Suppl.).

Moreover, when Congress concluded in 1974 that OMB had become a political instrument of the President, replacing its historical image as a bipartisan, neutral personal technical adviser on fiscal and organizational matters, it acted to subject the Director and Deputy Director to Senate confirmation. Pub. L. No. 93-250 (codified at 31 U.S.C. 502(a)-(b)(1982)). Perceived overreaching also moved Congress in 1973 to deny OMB the authority it had under the Federal Reports Act (the predecessor to the Paperwork Act) to clear information gathering requests of independent regulatory agencies. Pub. L. No. 93-153, Title IV, sec. 409 (codified at 44 U.S.C. 3512(1976)). The veto authority was restored to OMB in the 1980 Paperwork Act, but only in modified form: an OMB veto may now be overridden by a majority vote of the subject commission. 44 U.S.C. 3507(e)(1982).

Finally, it may be noted that Congress has directed OMB to promulgate rules pursuant to the public participatory procedures of the APA under the Paperwork Act, 44 U.S.C. 3516 (1982) and the Privacy Act, 5 U.S.C. 552a(f)(1988), and to make publicly available any communications from or to OIRA employees from either non-governmental persons or agencies respecting a proposed information collection request. 44 U.S.C. 3507(h) (Suppl. V. 1987).

The most recent pronouncements of the Supreme Court respecting Congress' authority to structure the administrative bureaucracy would appear to strongly support the constitutional validity of the public disclosure and accountability provisions proposed under S.1742 against a claim of encroachment on or interference with the President's ability to carry out his constitutional functions. Under the Court's decisions in *Morrison v. Olson*,

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Reorganization Act of 1973, Pub. L. No. 93-236, § 2021, 87 Stat. 990 (codified at 45 U.S.C. § 712(f)(1982)) (U.S. Railway Association).

108 S.Ct. 2597 (1988) and *Mistretta v. United States*, 109 S.Ct. 647 (1989), the burden is now on the Executive to demonstrate that the complained of congressional action has either reassigned one of his core functions to another branch or is an exercise of the function by Congress itself. Proof of encroachment or aggrandizement, normally shown as an incursion on a textually committed power, ends the inquiry without more. But if the matter involves the congressional ordering of arrangements between agencies of shared responsibility, the Executive must demonstrate that the challenged arrangement, first, prevents him from carrying out his constitutionally assigned functions and then, if it does, that the congressional action is not justified by an overriding need to accomplish some legitimate legislative goal.

Application of this standard to the imposition on OIRA of the proposed disclosure and accountability requirements of S.1742 would appear to raise no constitutional doubts as to its validity. There can be no question of congressional "aggrandizement" of executive powers or functions. Congress has retained for itself no powers of supervision or control over the regulatory review activities of the OMB Director or OIRA Administrator.

Moreover, the functions of OIRA are unlikely to be found to undermine impermissibly the powers of the Executive branch or to disrupt the proper balance between the coordinate branches by preventing the Executive branch from accomplishing its constitutionally assigned duties. The President's ability to communicate with and influence executive departments and agencies, either directly or through OIRA, is in no measure significantly diminished. His authority to dismiss all agency officers covered by E.O. 12291 is totally unaffected. Establishing and maintaining up-to-date and accurate dockets will certainly add to OIRA's administrative burden, but we are aware of no pertinent case precedent in which such a burden has been deemed to have constitutional significance. In any event, the rather substantial record of abuse of the regulatory review that has been established is likely to be seen as evidence of Congress' overriding need to accomplish the legitimate goal of safeguarding the fairness and integrity of agency decisionmaking through the informal rulemaking process.

Finally, any argument that the administrative burden of the new requirements would be constitutionally onerous has been severely undermined by an agreement reached on November 17, 1989 between the Chairman and Ranking Minority member of the House Government Operations Committee and the Director of OMB imposing substantially similar openness requirements on OIRA conduct of the regulatory review process. See 136 Cong. Rec. E3925 (daily ed., November 17, 1989). Under that agreement OIRA will establish dockets for all its review activities under E.O.'s 12291 and 12498 which will include all written materials between OMB and the agencies as well as lists of communications and meetings between OIRA personnel and persons outside the government, and detailed explanations of actions taken by OIRA. Each docket will be available for public inspection and copying at the time of the publication in the Federal Register by the subject agency of either an advanced notice of proposed rulemaking, a notice of proposed rulemaking, or of a notice of a final rule. The agreement also imposes specific time limits on OIRA review. The agreement can be viewed as evidence of the reasonableness of the requirements proposed by S.1742.

Morton Rosenberg
Specialist in American
Public Law

APPENDIX I

Executive Order No. 12291

EXECUTIVE ORDER NO. 12291 OF FEBRUARY 17, 1981

Federal Regulation

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. *Definitions.* For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel.

(b) "Major rule" means any regulation that is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. *General Requirements.* In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. *Regulatory Impact Analysis and Review.*

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, *provided that*, the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e)(1) The Director, subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c)(2);

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2); and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c)(3).

(f)(1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a)(2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. *Regulatory Review.* Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the Federal Register at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. *Regulatory Agendas.*

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. *The Task Force and Office of Management and Budget.*

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 *et seq.*

Sec. 7. *Pending Regulations.*

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective, excluding:

(1) Major rules that cannot legally be postponed or suspended;

(2) Major rules that, for good cause, ought to become effective as final rules without reconsideration. Agencies shall prepare, in accordance with Section 3 of this Order, a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order, and that has not yet become effective, and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a), including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require reconsideration, in accordance with this Order, of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may, in accordance with the Administrative Procedure Act and other applicable statutes, permit major rules that they have issued in final form as of the date of this Order, and that have not yet become effective, to take effect as interim rules while they are being reconsidered in accordance with this Order, *provided that*, agencies shall report to the Director, no later than 15 days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order, agencies shall, to the extent permitted by law, refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis, in accordance with Section 3 of this Order, has been prepared for the proposed major rule.

(f) Agencies shall report to the Director, no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order, together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule, in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations," which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. *Exemptions.*

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, *provided that*, any such regulation shall be reported to the Director as soon as it is practicable, the agency shall publish in the *Federal Register* a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statutes or by judicial order, *provided that*, any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the *Federal Register* a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. *Revocations.* Executive Orders No. 12044, as amended, and No. 12174 are revoked.

RONALD REAGAN

THE WHITE HOUSE
February 17, 1981

APPENDIX II

Executive Order No. 12498 and Presidential Memorandum

EXECUTIVE ORDER NO. 12498 OF JANUARY 4, 1985

Regulatory Planning Process

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to create a coordinated process for developing on an annual basis the Administration's Regulatory Program, establish Administration regulatory priorities, increase the accountability of agency heads for the regulatory actions of their agencies, provide for Presidential oversight of the regulatory process, reduce the burdens of existing and future regulations, minimize duplication and conflict of regulations, and enhance public and Congressional understanding of the Administration's regulatory objectives, it is hereby ordered as follows:

Section 1. *General Requirements*. (a) There is hereby established a regulatory planning process by which the Administration will develop and publish a Regulatory Program for each year. To implement this process, each Executive agency subject to Executive Order No. 12291 shall submit to the Director of the Office of Management and Budget (OMB) each year, starting in 1985, a statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions under way or planned; however, the Director may exempt from this order such agencies or activities as the Director may deem appropriate in order to achieve the effective implementation of this order.

(b) The head of each Executive agency subject to this Order shall ensure that all regulatory actions are consistent with the goals of the agency and of the Administration, and will be appropriately implemented.

(c) This program is intended to complement the existing regulatory planning and review procedures of agencies and the Executive branch, including the procedures established by Executive Order No. 12291.

(d) To assure consistency with the goals of the Administration, the head of each agency subject to this Order shall adhere to the regulatory principles stated in Section 2 of Executive Order No. 12291, including those elaborated by the regulatory policy guidelines set forth in the August 11, 1983, Report of the Presidential Task Force on Regulatory Relief, "Reagan Administration Regulatory Achievements."

Sec. 2. *Agency Submission of Draft Regulatory Program*. (a) The head of each agency shall submit to the Director an overview of the agency's regulatory policies, goals, and objectives for the program year and such information concerning all significant regulatory actions of the agency, planned or under way, including actions taken to consider whether to initiate rulemaking; requests for public comment; and the development of documents that may influence, anticipate, or lead to the commencement of rulemaking proceedings at a later date, as the Director deems necessary to develop the Administration's Regulatory Program. This submission shall constitute the agency's draft regulatory program. The draft regulatory program shall be submitted to the Director each year, on a date to be specified by the Director, and shall cover the period from April 1 through March 31 of the following year.

(b) The overview portion of the agency's submission should discuss the agency's broad regulatory purposes, explain how they are consistent with the Administration's regulatory principles, and include a discussion of the significant regulatory actions, as defined by the Director, that it will take. The overview should specifically discuss the significant regulatory actions of the agency to revise or rescind existing rules.

(c) Each agency head shall categorize and describe the regulatory actions described in subsection (a) in such format as the Director shall specify and provide such additional information as the Director may request; however, the Director shall, by Bulletin or Circular, exempt from the requirements of this order any class or category of regulatory action that the Director determines is not necessary to review in order to achieve the effective implementation of the program.

Sec. 3. *Review, Compilation, and Publication of the Administration's Regulatory Program.* (a) In reviewing each agency's draft regulatory program, the Director shall (i) consider the consistency of the draft regulatory program with the Administration's policies and priorities and the draft regulatory programs submitted by other agencies; and (ii) identify such further regulatory or deregulatory actions as may, in his view, be necessary in order to achieve such consistency. In the event of disagreement over the content of the agency's draft regulatory program, the agency head or the Director may raise issues for further review by the President or by such appropriate Cabinet Council or other forum as the President may designate.

(b) Following the conclusion of the review process established by subsection (a), each agency head shall submit to the Director, by a date to be specified by the Director, the agency's final regulatory plan for compilation and publication as the Administration's Regulatory Program for that year. The Director shall circulate a draft of the Administration's Regulatory Program for agency comment, review, and interagency consideration, if necessary, before publication.

(c) After development of the Administration's Regulatory Program for the year, if the agency head proposes to take a regulatory action subject to the provisions of Section 2 and not previously submitted for review under this process, or if the agency head proposes to take a regulatory action that is materially different from the action described in the agency's final regulatory program, the agency head shall immediately advise the Director and submit the action to the Director for review in such format as the Director may specify. Except in the case of emergency situations, as defined by the Director, or statutory or judicial deadlines, the agency head shall refrain from taking the proposed regulatory action until the review of this submission by the Director is completed. As to those regulatory actions not also subject to Executive Order No. 12291, the Director shall be deemed to have concluded that the proposal is consistent with the purposes of this Order, unless he notifies the agency head to the contrary within 10 days of its submission. As to those regulatory actions subject to Executive Order No. 12291, the Director's review shall be governed by the provisions of Section 3(e) of the Order.

(d) Absent unusual circumstances, such as new statutory or judicial requirements or unanticipated emergency situations, the Director may, to the extent permitted by law, return for reconsideration any rule submitted for review under Executive Order No. 12291 that would be subject to Section 2 but was not included in the agency's final Regulatory Program for that year, or any other significant regulatory action that is materially different from those described in the Administration's Regulatory Program for that year.

Sec. 4. *Office of Management and Budget.* The Director of the Office of Management and Budget is authorized, to the extent permitted by law, to take such actions as may be necessary to carry out the provisions of this Order.

Sec. 5. *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.

RONALD REAGAN

THE WHITE HOUSE
January 4, 1985

The White House

Office of the Press Secretary *January 4, 1985*

Memorandum for the Heads of Executive Departments and Agencies

Subject: Development of Administration's Regulatory Program.

With your help and active support, this Administration has substantially reduced the burden and intrusiveness of Federal regulatory programs. In the past three years, we have eliminated many needless rules, revised ill-conceived ones, and held the number of new rules to the minimum necessary. The policies and procedures of Executive Order No. 12291 have imposed long needed discipline on the rulemaking process. As a result, Federal paperwork and the size of the *Federal Register* have declined for four consecutive years—for the first time ever. Our accomplishments so far have been substantial, and we can take pride in them.

Much more can and should be done, however. Regulation has become one of the most important and costly activities of government, yet it is managed far less systematically than direct government spending. Several statutes and Executive Order No. 12291 establish procedures for agency rulemaking, but this is only the final stage of the regulatory process. Developing a government rule often involves years of studies, hearings, and intermediate decisions before even a proposed rule is issued for public comment. Frequently, senior agency officials are involved only after these earlier activities have greatly narrowed the options for final action and precluded effective Administration policy review.

Today, I have signed an Executive Order to establish a regulatory planning process by which we will develop and publish the Administration's Regulatory Program for each year. Under this process, it will be the personal responsibility of the head of each agency to determine—at the beginning of the regulatory process, not at the end—whether a given regulatory venture is consistent with the goals of the Administration and whether agency resources should be committed to it. Each agency head will thus be accountable for the management of the regulatory process, to ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to others.

To do this, I am requesting each regulatory agency to draft its proposed regulatory policies at the beginning of each year and to set forth a statement of priority regulatory activities, including prerulemaking actions, that constitute the agency's regulatory program for the year. This document should explain how each new activity will carry out the regulatory policies of this Administration and specify the agency's plan for reviewing and revising existing regulatory programs to bring them into accord with Administration policies.

After approval by the head of the agency, the agency's draft regulatory program should be submitted for review by the Office of Management and Budget. This review should focus on consistency with general Administration policy, and with the draft regulatory programs submitted by other agencies. The Office of Management and Budget will circulate a draft of the Administration's Regulatory Program for agency comment, review, and interagency consideration if necessary before the document is put in final form for publication. Issues may be raised for further review by a Cabinet Council or by me or by such other groups as I may designate. This review will not interfere with the exercise of authority committed by statute to heads of agencies.

The final regulatory programs for all agencies will be published by the Office of Management and Budget in May as the Administration's Regulatory Program for the twelve-month period beginning April 1, 1985. During the year, this document will be used as a basis for reviews of individual rules under Executive Order No. 12291. At the end of the year, it should be used to assess the agency's performance and to prepare the next year's program.

I am directing the Director of the Office of Management and Budget to implement this regulatory review process immediately and to establish the procedures under which these documents will be submitted to the Director and reviewed. For their first submission, agencies shall submit their draft regulatory program to the Director on the date specified by him. The Director will prepare for my consideration the goals and priorities for all agencies in a manner similar to the identification of significant issues in the fiscal budgetary process.

I am convinced that this process will result in substantial improvements in Federal regulatory policy. It will help ensure that each major step in the process of rule development is consistent with Administration policy. It will enable agency heads to manage agency regulatory actions more effectively, at the same time that it enables the President to hold agency heads more closely accountable for implementing Administration policy.

While ambitious, this program will build on our earlier efforts that have proven successful—the Executive Order No. 12291 review process, the reviews of inherited rules by the Task Force on Regulatory Relief, and the annual "paperwork budget" process.

I am confident that your wholehearted support will make this next stage in our regulatory reform program equally successful.

Ronald Reagan

APPENDIX III

Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12291 and 12498 [Revised]

June 13, 1986

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES SUBJECT TO EXECUTIVE ORDER NOS. 12291 AND 12498

From the time the President signed Executive Order No. 12291 on February 17, 1981, OMB has worked with the Departments and Agencies to develop and implement various procedures concerning the review of draft rules by the Office of Information and Regulatory Affairs (OIRA). We have also developed trial procedures and supported legislative proposals concerning our reviews as we have gained experience with these Executive Orders. For example last year, we implemented on a pilot basis with the Environmental Protection Agency additional procedures concerning OIRA's communications with persons outside the Federal Government.

We have also supported an American Bar Association Resolution that endorsed the President's regulatory review efforts and recommended that more information concerning our reviews be made available to Congress and the public.

The purpose of this memorandum is to advise you of additional procedures that we have determined, as a matter of administrative discretion, to implement concerning our review of draft rules under Executive Order No. 12291 and to set forth our policy on disclosure of agency regulatory program drafts under Executive Order No. 12498.

Current Procedures

These new procedures supplement our current procedures. As you are aware, Executive Order No. 12291 establishes certain procedures; the Administrative Procedure Act sets forth procedural and substantive requirements that govern agency action; other statutes establish procedures; and OIRA has adopted its own internal rules concerning its review of draft rules under Executive Order No. 12291. Furthermore, Departments and Agencies usually have established rules or practices to implement their rulemaking activities.

Attached to this memorandum are copies of some of the relevant materials concerning our reviews and procedures. Several of the most important features of these current procedures are:

Reviews Under Executive Order No. 12291

- **Rules must meet statutory requirements. Executive Order No. 12291 reviews cannot result in rules not authorized by law or rules that do not carry out statutory requirements.**
- **Rulemaking decisions are made by agency heads. Executive Order No. 12291 makes it clear that the rulemaking authority of the agency head is not displaced by the Order.**
- **Rules must be based on the agency record. Executive Order No. 12291 cannot cause rulemaking decisions that are not supported by the agency rulemaking record. The law requires that all agency decisions must be rationally based on information in the agency record.**
- **Requirements of Executive Order No. 12291 apply only to the extent permitted by law. If there is a conflict between the Executive Order or the President's regulatory principles in Executive Order No. 12291 and the law, the law governs.**

Current OIRA Procedures

- **Only the Administrator and Deputy Administrator within OIRA (or someone specifically designated by them) may communicate with someone who is not employed by the Federal Government on regulations submitted to OIRA for review under Executive Order No. 12291.**
- **Written materials received from anyone not employed by the Federal Government are made available in OIRA's public reading room for review by the public.**
- **OMB has advised persons who wish to send us information about regulatory proposals to *send information to the rulemaking agency*, with a copy to us, so that the material may be made a part of the agency record.**
- **In general, OIRA provides *written reasons* to the agency whenever OIRA returns a regulation to an agency for further review because it is not**

consistent with the President's regulatory principles.

- OIRA issues *full reports* annually on the disposition of all rules reviewed under Executive Order No. 12291, including a list of all returned rules.

New Procedures

1. OIRA will make available, upon written request made to OIRA after publication of an ANPRM or NPRM in the *Federal Register*, copies of any draft of the ANPRM or NPRM submitted for OIRA's review under Executive Order No. 12291;
2. Similarly, OIRA will make available, upon written request made to OIRA after publication of the final rule in the *Federal Register*, copies of any draft of the final rule submitted for OIRA's review under Executive Order No. 12291;
3. OIRA will make available, upon written request made to OIRA after the ANPRM, NPRM or the final rule is published in the *Federal Register*, all written correspondence concerning the draft submitted for OIRA's review under Executive Order No. 12291 that is exchanged between OIRA and the agency head. "Correspondence" means any documents exchanged between OIRA and the head of an agency.

These procedures are derived from provisions in S. 2433, as reported from the Senate Governmental Affairs Committee, with Administration support, in 1984. The Report on S. 2433 (No. 98-576, 98th Congress, 2d. Sess.) contains explanatory material as to how these provisions would have been interpreted had S. 2433 been enacted. We will be guided by that material in implementing these first three provisions.

4. OIRA will send EPA copies of all written material concerning EPA rules that OIRA receives from persons who are not employees of the Federal Government;
5. OIRA will advise EPA of all oral communications concerning EPA's rules, e.g., meetings, telephone calls, that OIRA (i.e., the Administrator and Deputy Administrator) has with persons who are not employees of the Federal Government; and
6. OIRA will invite EPA to all scheduled meetings with such persons concerning EPA's rules.

In May 1985, we instituted with EPA on a trial basis other procedures to better conform our Executive Order No. 12291 review procedures to EPA's somewhat unique internal procedures and statutory provisions concerning rulemaking. (See attached letter dated May 30, 1985, Attachment D.) These procedures are practical, and EPA believes that they are useful. This Memorandum revises those procedures with EPA and makes them a part of OIRA's current procedures.

(Note: These procedures do not apply to information collection requests under the Paperwork Reduction Act of 1980, even if such requests are a part of a proposed agency rule. Other procedures apply to such matters, see 5 CFR Part 1320.)

7. OIRA will apply these procedures (#4 through #6) to any other Department or Agency that is subject to Executive Order No. 12291 if that agency elects to institute these procedures, or any part of them.

Procedures #4 through #6 presently apply only to EPA. Although patterned upon EPA's statutory and internal procedures nonetheless, OIRA is prepared to extend these procedures to other agencies if the head of the agency so requests. A current list of agencies that have requested coverage will be maintained in the public reading room.

In addition,

8. OIRA will make available upon written request to OIRA made after the Regulatory Program is published, any agency draft submission sent to OIRA under Executive Order No. 12498. A copy will be available in the public reading room;
9. OIRA will continue to publish a complete annual accounting of Executive Order No. 12291 activities;
10. OIRA will make available upon written request to OIRA made after the end of a calendar month, a list of all draft ANPRMs, NPRMs and draft final rules for which OIRA has completed review under Executive Order No. 12291 during the preceding month (and the length of our review for each); and
11. OIRA will place in its public reading room: all written material received from persons outside the Federal Government concerning agency rules; a list of all meetings with persons outside the Federal Government pertaining to rules of an agency if that agency elects to participate in procedure #6; and a list of all other communications with persons outside the Federal Government pertaining to rules of any agency if that agency elects to participate in procedure #5.

Effective Date of New Procedures

The effective date of these new procedures is June 13, 1986, as explained below.

For purposes of new procedures #1 through #3, OIRA will make available in accordance with the conditions of those procedures, all drafts of the rule (and written correspondence referred to in procedure #3) if the review under Executive Order No. 12291 began on or after June 13, 1986, or was under review on that date. OIRA reviews of draft ANPRMs, NPRMs and final rules will be separate actions for purposes of disclosure. For example, copies of a draft NPRM under procedure #1 will be available in accordance with the conditions of procedure #1 after publication of the NPRM, if it was pending on or submitted after June 13, 1986, for review under Executive Order No. 12291. Disclosure of the draft NPRM would not be delayed until publication of a final rule. The reviews are distinct events for disclosure purposes. Similarly, if a review under Executive Order No. 12291 of a draft NPRM was completed prior to June 13, 1986, it would not be covered by these new procedures. Drafts of the final rule would be subject to procedure #2 if the final rule was pending on or submitted after June 13, 1986.

For purposes of procedures #4 through #6, the effective date will be the date of receipt of the request by the head of an agency to have these procedures apply. They apply as of June 13, 1986, for EPA. (Trial procedures with EPA have been effective since May 30, 1985.)

Procedure #8 will apply to drafts of the agency submissions for the *1986 Regulatory Program* and thereafter. The annual accounting referenced in procedure #9 is an appendix to the annual *Regulatory Program*. The lists referred to in procedures #10 and #11 will be available in OIRA's public reading room and upon written request on the 10th day of the month following the month for which the list is made. The first list will be available August 10, 1986. All written material pertaining to rules subject to Executive Order No. 12291 review received from persons not employed by the Federal Government as described in procedure #11 will be available within 3 to 5 days after receipt by OIRA.

These new procedures and OIRA's existing procedures are intended only to improve the internal management of the Federal Government, and are not intended to create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers or any person.

WENDY L. GRAMM
Administrator
Office of Information
and Regulatory Affairs

Attachments

A — Department of Justice/OLC Opinion dtd 2/13/81
B — Executive Order No. 12291 (see Appendix II)
C — Executive Order No. 12498 (see Appendix I)
D — OIRA Procedures #3

THE PAPERWORK REDUCTION AND FEDERAL INFORMATION RESOURCES MANAGEMENT ACT OF 1989

HON. JOHN CONYERS, JR.

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Friday, November 17, 1989

Mr. CONYERS. Mr. Speaker, I rise to introduce together with my distinguished colleague the Honorable FRANK HORTON of New York "The Paperwork Reduction and Federal Information Resources Management Act of 1989." This bill makes significant amendments to the Paperwork Reduction Act of 1980 and reauthorizes funding for the Office of Information and Regulatory Affairs [OIRA] which administers the Paperwork Reduction Act.

I am also inserting into the record an administrative agreement made between myself, Mr. HORTON and Mr. Darman of the Office of Management and Budget which revises and expands upon OIRA's procedures for conducting reviews of agency regulations under Presidential Executive Orders.

I would like to pay special tribute for this accomplishment to my friend FRANK HORTON, the ranking minority member of the Government Operations Committee, who is rightly known as the father of the Paperwork Act.

When we started negotiations last summer over the reauthorization of OIRA and revisions to the Paperwork Reduction Act it did not seem possible that our disparate views could be reconciled. But thanks to Mr. HORTON'S commitment and patience and the long history of good will between us—as well as the cooperation of OMB—we have managed to work out a tripartite agreement which may not fully satisfy any of us, but preserves the major policy goals of all the parties. The major aspects of this tripartite agreement are as follows:

OIRA will carry out both its review of proposed agency regulations and information collections according to strict deadlines and in the sunshine. Where OIRA causes substantive changes in agency proposals, it will be done on the record with detailed written explanations. Complaints that have been voiced by many in the public interest community that OIRA acts secretly and clandestinely and uses delay to defeat regulations designed to protect public health and safety because of unstated policy disagreements should become a thing of the past.

The original goal of the Federal Paperwork Commission and one of the goals of the act it spawned—to reduce the burden of unnecessary Federal paperwork—will be advanced. As a result of reforms developed by Mr. HORTON and his staff, procedures to eliminate redundant and unnecessary Federal information collections are strengthened while their benefits are maintained.

A major overhaul of Federal information dissemination policy is included in the bill. For the first time this will permit development of a coherent policy ensuring broad dissemination of public information products in a wide range of formats. Credit for this section of the bill belongs largely to Congressman BOB WISE, chairman of our Information Subcommittee, who has done a tremendous job in developing an agreement which meets the needs of the many diverse parties of the public information community.

I would also like to note my appreciation for the cooperation of OMB and OIRA, the third party to this agreement, for their cooperation in the final stages of these delicate negotiations. The bipartisan bill would not have been possible without the thoughtful participation of OMB Director Richard Darman and Jim MacCrae, Acting Administrator of OIRA. I know they feel they have surrendered some of their autonomy in what we call the "Administrative Agreement" which expands on the 1986 Gramm Memo governing procedures for regulatory review. In exchange, they will have the satisfaction of knowing that OIRA will be officially authorized and adequately funded through 1992.

In closing, I would like to add a word to some of my colleagues on the majority side, whom I know will be disappointed that we have omitted the restrictions on regulatory review from the bill itself. I believe this bill and the Administrative Agreement together accomplish our overriding purposes of making OIRA's review of agency regulations clearly accountable to Congress and the public. I have no doubt that the current administration at OMB and OIRA are genuinely interested in burying old hostilities, and will strictly adhere to the procedures in the new Administrative Agreement. In addition to which, it is the intention of both the majority and minority of the Government Operations Committee to closely monitor the process as part of our oversight functions.

I would therefore appeal for the unanimous support of the House majority behind this truly bipartisan legislation.

ADMINISTRATIVE AGREEMENT OUTLINING PROCEDURES GOVERNING OIRA REVIEW OF REGULATIONS UNDER EXECUTIVE ORDER NOS. 12291 and 12498

The procedures governing OIRA regulatory reviews pursuant to Executive Order Nos. 12291 and 12498 reflected in the OIRA Administrator's memorandum of June 13, 1986, are revised and updated as follows:

1. With respect to the review of agency submissions pursuant to Executive Order No. 12498—

A. For each annual review of proposed agency regulatory activities, OIRA shall establish a public docket for each agency whose submissions are reviewed. Such public docket shall include—

(1) a copy of all written material, including drafts of any proposed agency activity, exchanged between OIRA and the agency;

(2) a copy of all written material exchanged between OIRA and any other person not employed by the Federal government.

B. OIRA shall maintain a list of agency submissions that contains the information identified in Section 3 of this memorandum. This list shall be placed in the public docket of each submission.

C. OIRA will make available for public inspection and copying the public docket described in Section 1(A) of this memorandum and the list described in Section 1(B) of this memorandum on the date of publication of the annual Regulatory Program. For agency submissions made subsequent to the publication of the Regulatory Program, OIRA will make available a public docket upon completion of OIRA review.

2. With respect to the review of proposed and final agency rules pursuant to Executive Order No. 12291—

A. Reviews under Executive Order No. 12291 will be guided by the following principles:

(1) Rules must meet statutory requirements. Executive Order No. 12291 reviews cannot result in rules not authorized by law or rules that do not carry out statutory requirements.

(2) Rulemaking decisions are made by agency heads. Executive Order No. 12291 makes it clear that the rulemaking authority of the agency head is not displaced by the Order.

(3) Rules must be based on the agency record. Executive Order No. 12291 cannot cause rulemaking decisions that are supported by the agency rulemaking record. The law requires that all agency decisions must be rationally based on information in the agency record.

(4) Requirements of Executive Order No. 12291 apply only to the extent permitted by law. If there is a conflict between the Executive Order or the President's regulatory principles in Executive Order No. 12291 and the law, the law governs.

(5) OIRA review of a proposed or final rule shall be expeditious and conform with deadlines imposed by statute, judicial order or administrative agreement.

B. For each agency rule reviewed by OIRA, the Office shall establish a public docket which will be made available pursuant to Section 2(H) of this memorandum that must include the following information:

(1) a copy of all written material regardless of format, including all drafts of any proposed or final rule, exchanged between OIRA and the agency;

(2) a copy of all written material, regardless of format, exchanged between OIRA and any persons not employed by the Federal government;

(3) a list of all meetings with persons outside the Federal Government pertaining to rules of an agency;

(4) a list of all other communications with persons outside the Federal Government pertaining to a rule;

(5) a detailed written explanation set forth in Section 2(C) of this memorandum; and

(6) a register for each individual rulemaking which contains the logging information identified in Section 3 of this memorandum.

C. When a review is concluded with substantive changes made by the agency as a result of the review process, suspension of review by OIRA, or by return of the draft rule to the agency for further consideration, OIRA will put a detailed written explanation of the specific reasons for all substantive changes made to the proposed or final rule, or for the return of the rule, as the case may be, in the public docket.

D. OIRA will transmit, on a timely basis, to the head of any agency which has a rule under review a copy of all written material concerning the subject rule that OIRA receives from non-governmental persons.

E. OIRA will inform the head of any agency, on a timely basis, of the substance of all oral communications concerning the agency's rules, e.g., meetings, telephone calls, the OIRA has with persons who are not employees of the Federal Government.

F. Only the Administrator and Deputy Administrator of OIRA may communicate with any person who is not employed by the Federal Government about regulations submitted to such office for review. Substantive discussions about such regulations will not occur unless a representative of the agency promulgating the rule has been invited pursuant to Section 2(g) of this memorandum.

G. OIRA shall inform the head of any agency which has a rule under review of all scheduled meetings with any agency or nongovernmental persons concerning the subject rule and shall provide the agency with a reasonable opportunity to attend such meetings.

H. OIRA will make the public docket for any rulemaking available for public inspection and copying on the date of publication in the Federal Register of an Advanced Notice of Proposed Rulemaking or Notice of Proposed Rulemaking (with respect to proposed rules) or on the date of publication in the Federal Register of a final rule, or when Executive Order No. 12291 review is otherwise concluded pursuant to Section 2(J) of this memorandum.

I. OIRA will make available after the end of a calendar month a list of all draft ANPRMs, NPRMs and draft final rules for which OIRA has concluded review under Executive Order No. 12291 during the preceding month and the length of review for each.

J. The time for OIRA to conclude review of agency rules, whether proposed or final, shall not exceed sixty days following receipt of such rule by the Office. The time for review may be extended for good cause by OIRA for an additional thirty days. Notices of any such extension, together with a detailed statement of the reasons therefore, shall be placed in the rulemaking docket and a copy shall be sent to the agency. Review is concluded by return of the rule to the agency, suspension of review by OIRA, or clearance with or without changes.

K. OIRA will continue to publish a complete annual accounting of Executive Order No. 12291 activities. In addition to the current information the report shall also contain the following:

(1) a list, by agency and by action taken, of proposed and final rules that have been at OIRA for review for less than 30 days, from 30-60 days, 60-90 days, and more than 90 days, and whether it is a proposed or final rule;

(2) a list, by agency and title, of regulations suspended during the year with rule type, date received and date suspended; and

(3) a list, by agency and title, of regulations that are consistent with change with rule type, date received and date reviewed.

3. With respect to the review of all agency written submissions on rules under Executive Order No. 12291 or regulatory program proposals under Executive Order No. 12498 by OIRA, a chronological list will be included in the public docket containing the following information:

(1) the identifying name and number of the submission;

(2) the name of the submitting agency;

(3) the date of receipt by OIRA of the submission;

(4) the name of the OIRA desk officer to whom the submission is assigned for review;

(5) the review authority (e.g., E.O. 12498, E.O. 12291)

(6) the final actions taken; and

(7) the date of such actions.

4. With respect to each agency activity under review under Executive Order Nos. 12498 and 12291 OIRA shall inform agencies that they have the opportunity to supplement their public docket of a rulemaking activity to include the following—

(1) copies of all written materials which the agency provides to or receives from OIRA;

(2) information about all submissions made by the agency to OIRA including—(a) the date of the submission; (b) the nature of the activity with respect to which the submission is made; and (c) the name of the person at OIRA to whom the submission is made;

(3) a written explanation of the agency's specific reasons for all substantive changes in the draft or final rule which responds to any written or oral comment made by OIRA on any draft of a proposed or final rule.

5. For purposes of this memorandum, "substantive" means any significant action that affects or relates to the content of an agency submission; for example, "substantive change" or "substantive communication." It does not include: (1) stylistic, clerical, or grammatical matters; (2) simple descriptions of a submission; or (3) status reports. It does include, but is not limited to: (1) modifications of agency cost/benefit analyses; (2) suggested changes to or criticisms of the proposal; (3) alteration of recordkeeping or reporting requirements; and (4) assessments of the impact of the agency submission.

6. For purposes of this memorandum a "proposed rule" means an advanced notice of proposed rulemaking (ANPRM) and a notice of proposed rulemaking (NPRM).

7. For purposes of this memorandum a "detailed written explanation" includes the ways in which the suggested changes differ from the initial proposal, the analytical and statistical reasons justifying such changes, and whether such changes are justified in light of the statutory mission of the agency.

TED WEISS, NEW YORK, CHAIRMAN
HENRY A. WAXMAN, CALIFORNIA
NANCY PELOSI, CALIFORNIA
DONALD M. PAYNE, NEW JERSEY
CARDISS COLLINS, ILLINOIS

RICHARD K. ARMEY, TEXAS
PETER SMITH, VERMONT
ILEANA ROS-LEHTINEN, FLORIDA

ONE HUNDRED FIRST CONGRESS
Congress of the United States
House of Representatives
HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-372
WASHINGTON, DC 20515
(202) 225-2548
FAX NO. 225-2382

January 8, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
SD-340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear ~~Senator Glenn~~ John:

Reauthorization of the Paperwork Reduction Act (PRA) is one of the most important issues that will be considered by our respective committees after Congress reconvenes later this month. I am writing to urge you to include a strong provision in the Senate bill that addresses the Office of Management and Budget's (OMB) regulatory review activities.

I know you share my concern about the propriety of OMB's review of regulations under Executive Orders 12291 and 12498. One of the most troubling aspects of OMB's actions is the secrecy in which they take place. Behind closed doors, nameless and faceless OMB employees have forced expert agencies like the Food and Drug Administration to alter regulations. These orders are often issued orally, with no documentation of the communication.

On September 20, 1989, I introduced H.R. 3314, the "Regulatory Influence Reporting Amendments of 1989," to impose procedural requirements that are designed to make OMB more accountable to the public. I understand that Senator Bingaman has introduced a bill (S. 1742) to reauthorize the PRA which includes a section on OMB's regulatory review activities.

As you know, the current House committee bill fails to address the regulatory review issue. Instead, a separate "administrative agreement" on this issue was made with OMB.

I strongly believe that Congress must enact legislation, rather than rely on a written agreement, to rein in OMB's interference in the regulatory process. First, the "administrative agreement" is totally unenforceable, having neither the force of law or even regulation. Should OMB ignore the agreement, no judicial review would be possible. Second, the agreement undermines the legislative reauthorization process by depriving the Congress of the opportunity to debate and vote on the issue.

While the legislation I introduced differs somewhat from Senator Bingaman's bill, both accomplish the primary objective of addressing this issue legislatively. I encourage your committee to keep the regulatory review issue in the PRA reauthorization bill as it works its way through the Senate.

Please feel free to contact me or Mitchell Zeller at 225-2548 if you or your staff wish to discuss this important matter.

With warm regards,

Ted

TED WEISS
Chairman

TW:mz

cc: Senator Bingaman
Senator Roth
Senator Rudman
Senator Levin

I

101st CONGRESS
1st Session

H. R. 3314

To require employees of the Office of Management and Budget and other Federal agencies to report oral communications relating to activities of that office, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

September 20, 1989

Mr. Weiss introduced the following bill; which was referred to the Committee on Government Operations

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A BILL

To require employees of the Office of Management and Budget and other Federal agencies to report oral communications relating to activities of that office, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Influence Reporting Amendments of 1989".

SEC. 2. REPORTING REQUIREMENTS.

(a) Logging and Disclosure of Oral and Written Communications.—

(1) LOGGING OF ORAL COMMUNICATIONS.—An employee of the Office of Management and Budget shall log in writing each oral communication between that employee and any person who is not such an employee, which relates to any regulatory activity not later than one day after the date of that communication.

(2) INFORMATION TO BE LOGGED.—Information logged pursuant to this subsection shall include—

(A) the date of the communication;

(B) the names, titles, and affiliations of the participants in the communication;

(C) the subject matter of the communication; and

(D) a brief summary of the substance of the communication.

(3) AVAILABILITY OF INFORMATION.—Information logged under this subsection, and any written communication between an employee of the Office of Management and Budget and any other person regarding any activity of the Office of Management and Budget, shall be made available to the public in the same manner as written communications are required to be made available pursuant to section 3507(h) of title 44, United States Code, not later than 3 days

after the date the oral communication to which the information relates is logged or the written communication is made or received by the employee, respectively.

(b) SEPARATE RECORD OF REVIEW.—

(1) IN GENERAL.—The Director of the Office of Management and Budget shall establish and maintain a separate record for each regulatory activity reviewed by the Office of Management and Budget.

(2) CONTENT OF RECORD.—Each record established pursuant to this section shall include with respect to the regulatory activity that is the subject of the record—

(A) copies of all written materials which are—

(i) received by the Office of Management and Budget from a person who is not an employee of the Office of Management and Budget; or

(ii) provided by the Office of Management and Budget to such a person;

(B) copies of all information logged pursuant to subsection (a); and

(C) copies of any changes made or suggested by the Office of Management and Budget in the regulatory activity under review, including the reasons for such changes as required by subsection (e).

(3) AVAILABILITY OF MATERIALS, INFORMATION, AND CHANGES.—All materials, information, and changes and the reasons therefor referred to in paragraph (2) shall be made available to the public not later than 3 days after they are received, provided, logged, or made, as applicable, in the same manner as written communications are required to be made available pursuant to section 3507(h) of title 44, United States Code.

(c) NOTIFICATION OF AGENCY REGARDING MEETINGS AND CONTACTS.—The Director of the Office of Management and Budget—

(1) shall notify the head of an agency of all meetings and other contacts between employees of the Office of Management and Budget and any person who is not such an employee concerning any regulatory activity of that agency; and

(2) shall provide that agency head or his or her designee a reasonable opportunity to attend any such meeting.

(d) MAINTENANCE OF RECORDS BY AGENCY ISSUING RULES.—The head of each agency shall include in the record of each rule or regulation submitted by the agency for review by the Office of Management and Budget—

(1) copies of all drafts of advanced notices of proposed rulemaking, notices of proposed rulemaking, and notices of final rules; and

(2) copies of any changes in the rule or regulation (including changes in any advanced notice of proposed rulemaking, notice of proposed rulemaking, or notice of final rule relating to that rule or regulation) made or suggested by the Office of Management and Budget, including the reasons for such changes which are provided to the agency by the Director of the Office of Management and Budget pursuant to subsection (e)(2).

(e) PERIOD FOR REVIEW.—

(1) IN GENERAL.—(A) The Director of the Office of Management and Budget shall complete review of any regulatory activity of an agency not later than the earlier of—

(i) 30 days after the date of the submission of the regulatory activity to the Office of Management and Budget by the agency; and

(ii) any date established by statute or court order for completion of the regulatory activity.

(B) The period provided for by subparagraph (A) for completion of review of a regulatory activity by the Director shall not be extended.

(2) CHANGES.—Each change in a regulatory activity, which is made or proposed by an employee of the Office of Management and Budget shall be—

(A) submitted by the Office of Management and Budget in writing to the head of the agency conducting the regulatory activity, with a statement of the reasons for such change or proposed change; and

(B) signed by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget.

(3) PUBLICATION.—The head of an agency which submits an advanced notice of proposed rulemaking, notice of proposed rulemaking, proposed rule, or final rule to the Office of Management and Budget for review shall publish the contents of that submission in the Federal Register at the end of the 30-day period described in paragraph (1) if the Director fails to act within that period.

(f) EFFECT ON RULEMAKING AUTHORITY.—Nothing in this Act shall alter in any manner—

(1) the authority of any agency to initiate, conduct, or complete a rulemaking proceeding; or

(2) the criteria for rulemaking established by any other law.

(g) EFFECT ON DISCLOSURE REQUIREMENTS.—This Act shall not be considered—

(1) to alter the authority of the Congress to obtain information from any agency in the executive branch of the Federal Government; or

(2) to require the public disclosure of—

(A) any communications between the Office of Management and Budget and any other office within the Executive Office of the President; or

(B) any information which is exempted from disclosure under section 552(b) (1), (3), (4), and (6) through (9) of title 5, United States Code.

SEC. 3. AGENCY LOGGING AND DISCLOSURE OF ORAL COMMUNICATIONS WITH OMB.

Section 553 of title 5, United States Code, is amended by inserting after subsection (e) the following:

"(f)(1) An employee of an agency shall log in writing each oral communication between that employee and any employee of the Office of Management and Budget, which relates to any regulatory activity not later than one day after the date of that communication.

"(2) Information logged pursuant to this subsection shall include—

"(A) the date of the communication;

"(B) the names, titles, and affiliations of the participants in the communication;

"(C) the subject matter of the communication; and

"(D) a brief summary of the substance of the communication.

"(3) Information logged under this subsection, and any written communication between an employee of an agency and any employee of the Office of Management and Budget regarding any regulatory activity of the agency, shall be made available to the public in the same manner as written communications are required to be made available pursuant to section 3507(h) of title 44, United States Code, not later than 3 days after the date the oral communication to which the information relates is logged or the written communication is made or received by the agency employee, respectively.

"(4) In this subsection—

"(A) the term 'regulatory activity' means any advance notice of proposed rulemaking, notice of proposed rulemaking, notice of a final rule, and any other activity that could affect an agency decision or action;

"(B) the term 'oral communication' includes any meeting, phone conversation, briefing, or discussion;

"(C) the term 'rule'—

"(i) means any agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency; and

"(ii) does not include any administrative action which is subject to sections 556 and 557 of title 5, United States Code.".

SEC. 4. DEFINITIONS.

In this Act—

(1) ORAL COMMUNICATION.—The term "oral communication" includes any meeting, phone conversation, briefing, or discussion.

(2) REGULATORY ACTIVITY.—The term "regulatory activity" means any advance notice of proposed rulemaking, notice of proposed rulemaking, notice of a final rule, and any other activity that could affect an agency decision or action.

(3) RULE.—The term "rule"—

(A) means any agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency; and

(B) does not include any administrative action which is subject to sections 556 and 557 of title 5, United States Code.

The New York Times

NEW YORK, THURSDAY, FEBRUARY 22, 1990

High Court Decides Budget Office Exceeded Power in Blocking Rules

By LINDA GREENHOUSE

Special to The New York Times

WASHINGTON, Feb. 21 — Dealing an unexpected setback to the deregulatory efforts of the Reagan and Bush administrations, the Supreme Court ruled today that the White House budget office lacked statutory authority to block certain regulations issued by other Federal agencies.

The Court held that the White House agency, the Office of Management and Budget, overstepped its authority two years ago when it disapproved parts of a Labor Department regulation requiring nearly all employers to warn their workers about the prospect of exposure to hazardous substances on the job.

The 7-to-2 decision applies to a broad category of regulations over which the budget office has asserted control, affecting areas like food ingredients, housing inspections, and pension benefits.

Long Political Struggle

The budget office refused in 1987 to permit the Labor Department regulation, known as the Hazard Communication Standard, to apply to the construction industry, and it did not take effect in construction. As its legal authority to limit the regulation, the budget office relied on the Paperwork Reduction Act of 1980.

The standard itself was the result of a long political struggle during Ronald Reagan's Administration. The Occupational Safety and Health Administration, a unit of the Labor Department, at first issued narrow disclosure rules, limited to manufacturing industries. A group of labor unions as well as a con-

Continued on Page B8, Column 1

High Court Holds O.M.B. Overstepped Authority

Continued From Page A1

sumer group sued successfully in 1983 to force the agency to issue a broader standard. The regulations issued in 1987, before the budget office's disapproval, applied to work sites in all sectors of the economy.

The Paperwork Reduction Act, which the Supreme Court had never interpreted before today, requires Federal agencies to get the budget office's approval before issuing regulations that required the collection of information. Aimed at relieving the public of the growing burden of filling out Federal forms, the law was passed in the final months of Jimmy Carter's Administration.

During the Reagan Administration, the Office of Management and Budget relied strongly on the paperwork law as the basis for taking control of the Federal regulatory process, a role that was much disputed by critics of the office.

In an opinion by Justice William J. Brennan Jr., the Court today said that the budget office's authority under the Paperwork Reduction Act is considerably more limited than the office had supposed.

The paperwork law applies only to regulations that require information to be reported to the Government itself, Justice Brennan said. He said the law does not give the O.M.B. authority over the Hazard Communication Standard or similar regulations, which require private parties — in this case, employers — to disclose information, not to the Government, but to other private parties, their employees.

Bush is dealt a major setback in efforts at deregulation.

Bush Argument Dismissed

Justice Brennan said the Administration's argument that the statute gave the budget office broader authority was untenable under a careful reading of the Paperwork Reduction Act.

He said the purpose of the act was to limit the increasing burden of filling out Federal forms and providing information to the Government, as well as minimizing the cost to the Government of handling the information.

Justice Brennan said, "Because Congress expressed concern only for the burden imposed by requirements to provide information to a Federal agency, and not for any burden imposed by requirements to provide information to a third party, O.M.B. review of disclosure rules would not further this Congressional aim."

He said the paperwork law was so clear that "we decline to defer to O.M.B.'s interpretation."

Barbara Clay, a spokeswoman for the budget office, said today there would be no comment on the Supreme Court decision.

Labor Pleased With Decision

In Bal Harbour, Fla., where the leaders of the American Federation of Labor and Congress of Industrial Organizations are holding their annual meeting, news of the court's decision was greeted happily.

Margaret Seminario, health and safety director for the federation, said the decision should speed up the process of issuing regulations, including some that have been blocked at the Occupational Safety and Health Administration and others that she said agencies had watering down to accommodate the budget office. She said one is an O.S.H.A.-prepared requirement that cancer warnings be put on containers of the chemical formaldehyde.

The Court's decision upheld a ruling by the United States Court of Appeals for the Third Circuit in Philadelphia. The budget office's action had been challenged by a labor union, the United Steelworkers of America, and by Public Citizen Inc., an organization affiliated with Ralph Nader.

Administration Appealed Decision

In its 1988 decision, the appeals court said that the O.M.B. had attempted to exercise "substantive lawmaking authority" that Congress had not given it.

When the Bush Administration appealed the third circuit's ruling early last year, its brief warned that the decision would have a drastic result and if not overturned "would effectively invalidate O.M.B. authority to review a wide range" of agency regulations beyond the Hazard Communication Standard. The brief said the Hazard Communication Standard itself imposed "one of the most significant paperwork requirements in regulatory history."

According to the Government's brief, the budget office has recently been in the process of review a wide range of disclosure rules covering areas like food ingredients, housing inspections, pension benefits, hearing aids, funeral services and lead-based paint.

Rehnquist and White Dissent

Justice Brennan's opinion, Dole v. Steelworkers, No. 88-1434, was joined by Justices Thurgood Marshall, Harry A. Blackmun, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia and Anthony M. Kennedy.

Justice Byron R. White wrote a dissenting opinion that Chief Justice William H. Rehnquist joined. They said the Court had failed to give proper deference to the budget office's interpretation of the paperwork law.

The Office of Management and Budget was established in the Executive Office of the President in 1970 under executive orders that authorize it to supervise and coordinate the preparation of the budget among other executive branch agencies.

The Supreme Court ruled that many unsecured promissory notes, sold privately and not traded on any exchange, were subject to Federal regulation. Business Day, page D1.

O.M.B. Viewed as Intrusive

Congress — not the Executive Office — created the Occupational Safety and Health Administration as well as dozens of other Federal regulatory agencies. O.S.H.A.'s mandate since its birth in 1970 has been to improve safety on the job through its power to issue regulations.

Agency heads have occasionally chafed at what they have viewed as intrusions by the O.M.B. beyond budget questions into areas of policy. The clashes have been particularly pointed when the agency heads believed the budget office was frustrating their efforts to carry out Congressional mandates. But Mr. Reagan and Mr. Bush both supported the budget office in its exercise of broad managerial powers over the other departments and agencies in the executive branch.

In its decision today limiting the budget office's authority under one statute, the Paperwork Reduction Act, the Supreme Court did not address broader questions about the budget office's role within the executive branch or its authority under various Presidential directives to oversee the work of other agencies.

The Court also issued these other decisions today:

Rails to Trails

The Court unanimously upheld the constitutionality of a 1983 law designed to facilitate the conversion of unused railroad tracks into scenic trails.

The law, an amendment to the National Trails System Act, permits the Interstate Commerce Commission, which regulates railroads, to transfer the rights of way of unused tracks to local governments or organizations for operation as trails. But in many instances, the railroads seeking to abandon their tracks do not actually own the property but have simply used it under easements granted in earlier years by the property owners.

A Vermont couple who owned several hundred feet along an abandoned branch line sued the commerce commission on the ground that the property's conversion into a bicycle path was an unconstitutional taking of their private property without compensation.

In an opinion by Justice Brennan, the Court said the law presented no constitutional problem because property owners could sue for damages in the United States Claims Court under a Federal law known as the Tucker Act. The opinion also said that the law was a valid exercise of the power of Congress to regulate interstate commerce.

The decision, Preseault v. I.C.C., No. 88-1076, upheld a ruling by the United States Court of Appeals for the Second Circuit, in New York.

The Washington Post

THURSDAY, FEBRUARY 22, 1990

Court Curbs OMB's Ability To Block Disclosure Rules

By Ruth Marcus
Washington Post Staff Writer

The Supreme Court ruled yesterday that the Office of Management and Budget (OMB) can no longer block regulations requiring companies to provide health, safety and other consumer information to workers or the public on the grounds that the disclosures require excessive paperwork.

The ruling takes away a powerful weapon OMB has used during the last decade to expand its power over the federal government's rulemaking.

In a 7 to 2 decision, the court held that the Paperwork Reduction Act, a law designed to prevent excessive record-keeping and reporting requirements, does not authorize OMB to review a broad array of rules enacted by federal agencies requiring businesses to inform consumers or employees about their products or the effects of manufacturing them.

Under the act, OMB has reviewed nutrition labeling rules adopted by the Food and Drug Administration (FDA), fair packaging and fair labeling requirements implemented by the Federal Trade Commission (FTC), and community right-to-know rules imposed by the Environmental Protection Agency (EPA) on plants' handling of hazardous chemicals.

The court said the act, which requires agencies to submit "informa-

See COURT, A6, Col. 1

OMB's Ability to Block Rules Restricted

COURT, From A1

tion-collection requests" to OMB for approval, applies only to agencies' efforts to gather facts for their own use.

The decision "will end the ability of OMB to stem the flow of consumer information, hazard warnings and other disclosures that expert government agencies decide are needed to protect the public," said David C. Vladeck of Public Citizen Litigation Group, which participated in the case.

Deputy Solicitor General John G. Roberts Jr. termed the ruling "disappointing," adding: "We thought it is a good thing to have OMB looking to reduce the paperwork burden on the American public."

OMB has estimated that the kind of reporting and record-keeping requirements affected by the ruling took up 250 million hours in 1988—an eighth of the overall federal paperwork burden.

According to OMB Watch, a public interest group, the budget agency has used the act to block proposed Occupational Safety and Health Administration (OSHA) requirements that formaldehyde be labeled a potential human carcinogen, to kill EPA requirements that wood stoves carry stickers detailing their thermal efficiency, and to loosen FDA food labeling rules preventing manufacturers from making claims that their products prevent specific diseases.

The decision in *Dole v. United Steelworkers of America* permits the full implementation of far-reaching OSHA disclosure regulations that affect virtually every business in the nation. OMB estimated that the rules will entail about 54 million hours of paperwork in the first year alone.

The rules were originally proposed by OSHA in 1983 but have been stymied in part by litigation. They require chemical manufacturers to post warnings on containers of hazardous material, to provide safety data sheets detailing the hazards to companies that buy the product, to make the information available to employees and offer training on the dangers.

OMB vetoed part of the regulation requiring that the safety data sheets be provided at places like construction sites, where there is more than one employer, asserting that it would impose huge paperwork burdens with little practical utility.

It also rejected portions exempting consumer products used in the workplace and certain drugs regulated by FDA, concluding that the exemptions did not go far enough.

In upholding a ruling by the federal appeals court in Philadelphia, Justice William J. Brennan Jr., writing for the majority, said the Paperwork Reduction Act was not designed to apply to disclosure regulations.

"An agency chooses to impose a warning requirement because it

See COURT, A7, Col. 1

Court Limits Use of Paperwork Act

COURT, From A6

believes that such a requirement is the least intrusive measure that will sufficiently protect the public, not because the measure is a means of acquiring information useful in performing some other agency function," he said.

Justice Byron R. White, joined by Chief Justice William H. Rehnquist, dissented, saying that "it makes little difference" to a company in terms of its paperwork burden whether it must collect information in order to submit it to a government agency or provide it directly to workers.

"Reading the court's discussion of the act, one might think that Congress was only concerned with minimizing the government's costs and reducing the paperwork burdens on federal agency employees who are forced to process massive amounts of information," White said.

Although yesterday's decision limits OMB's authority in reviewing disclosure requirements, critics of the agency noted that it still may be able to use Reagan-era executive orders requiring agencies to submit proposed regulations to OMB for cost-benefit analysis and for review to determine whether they are "consistent with the president's policies and priorities."

"In practice, it may not alter a whole heck of a lot," said Gary Bass of OMB Watch.

But Vladeck said it is "certainly open to doubt" that OMB retains the power to do under the executive orders what Congress has prohibited it from doing under the paperwork law. "This ruling cuts off a lot of the authority OMB has asserted in the past," he said.

In other action yesterday, the court upheld the constitutionality of a federal law that encourages abandoned railroad rights of way to be used for nature trails, unanimously rejecting arguments that the 1983 "rails-to-trails" act deprives property owners of their land without just compensation.

Brennan said the court did not have to decide whether the law represented a taking because property owners to whom the right of way might have reverted once the railroad abandoned it could use another law to sue the government for compensation.

Montgomery County, which spent $10.5 million to buy 6½ miles of railroad corridor in 1988 to use for recreational trails and eventually a light rail system from Bethesda to Silver Spring, filed a friend-of-the-court brief in *Presault v. Interstate Commerce Commission.*

The county warned that "an adverse ruling will undercut the county's ability to timely provide the right of way" needed to construct the rail line.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOLE, SECRETARY OF LABOR, ET AL. *v.* UNITED STEELWORKERS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-1434. Argued November 6, 1989—Decided February 21, 1990

Pursuant to the Occupational Safety and Health Act of 1970, petitioner Department of Labor (DOL) promulgated a Hazard Communications Standard, which imposed disclosure requirements on manufacturers aimed at ensuring that their employees were informed of the potential hazards posed by chemicals in the workplace. Among other things, the Standard required the manufacturers to label hazardous chemical containers, conduct training on the chemicals' dangers, and make available to employees safety data sheets on the chemicals. Respondents and others challenged the Standard in the Court of Appeals. The court held that the Occupational Safety and Health Administration (OSHA) had not adequately explained why the Standard was limited to the manufacturing sector and twice directed OSHA either to apply it to workplaces in other sectors of the economy or to state why such application would be infeasible. Ultimately, DOL issued a revised Standard that applied to worksites in all sectors and submitted it to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (Act). That Act sets forth a comprehensive scheme to reduce the federal paperwork burden on the public by requiring, *inter alia*, an agency to submit any instrument for the "collection of information"—termed an "information collection request"—to the OMB for approval before it may collect the information. OMB disapproved three of the Standard's provisions on the ground that their requirements were not necessary to protect employees, and DOL published notice withdrawing the provisions. Respondents sought further relief from the Court of Appeals, which ordered DOL to reinstate the disapproved provisions. The court reasoned that the provisions represented good faith compliance by DOL with the court's prior orders, that OMB lacked the authority under the Act to disapprove the provisions, and that, therefore, DOL had no legitimate basis for withdrawing them.

Held: The Act does not authorize OMB to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties. Pp. 5–16.

(a) The Act's language indicates that the terms "information collection request" and "collection of information"—which is defined as "the obtaining or soliciting of facts by an agency through . . . reporting or recordkeeping requirements"—refer solely to the collection of information by, or for the use of, a federal agency, rather than to disclosure rules, which do not result in information being made available for agency use. Petitioners' interpretation of the above definition—that an agency is "soliciting facts" when it requires someone to communicate specified data to a third party and that rules requiring labeling, employee training, and the keeping of accessible data sheets are "reporting and recordkeeping requirements"—is precluded by the language, purpose, and structure of the Act as a whole. Pp. 7–8.

(b) Under the traditional canon of construction requiring that words grouped in a list be given a related meaning, the phrase "reporting and recordkeeping requirements" would comprise only rules requiring information to be sent or made available to a federal agency, not disclosure rules, since the other examples listed are forms for communicating information to a party requesting that information. P. 9.

(c) Moreover, disclosure rules present none of the problems Congress sought to solve, and none of the enumerated purposes would be served by subjecting such rules to the Act's provisions. Pp. 9–11.

(d) That Congress did not intend the Act to encompass disclosure rules is further revealed by the language and import of other provisions. The internal preliminary steps that an agency must take before adopting an information collection request affect agencies only when they gather information for their own use and do not relate to disclosure rules. Likewise, the provisions governing OMB's review of proposed agency information collection requests focus on an agency's ability to use the information, particularly its ability to process it. The Act does not authorize OMB to determine the usefulness of agency-adopted warning requirements to those being warned. Furthermore, the Act's enforcement mechanism by its terms does not apply to disclosure rules, and its clear legislative history shows that Congress intended the provision to apply to all collections of information subject to the Act. Pp. 11–13.

(e) The Act's legislative history does not support petitioners' contention that Congress intended "collection of information" to include disclo-

Syllabus

sure rules. This Court need not defer to OMB's contrary interpretation where Congress' intent is clear. Pp. 13–16.

855 F. 2d 108, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL., PETITIONER *v.* UNITED STEELWORKERS OF AMERICA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February 21, 1990]

JUSTICE BRENNAN delivered the opinion of the Court.

Among the regulatory tools available to government agencies charged with protecting public health and safety are rules which require regulated entities to disclose information directly to employees, consumers, or others. Disclosure rules protect by providing access to information about what dangers exist and how these dangers can be avoided. Today we decide whether the Office of Management and Budget (OMB) has the authority under the Paperwork Reduction Act of 1980 (Act), 44 U. S. C. § 3501 *et seq.* (1982 ed. and Supp. V), to review such regulations.

I

In 1983, pursuant to the Occupational Safety and Health Act of 1970 (OSH Act), 84 Stat. 1590, 29 U. S. C. § 651 *et seq.* (1982 ed.), which authorizes the Department of Labor (DOL) to set health and safety standards for workplaces, DOL promulgated a Hazard Communications Standard. 29 CFR § 1910.1200 (1984). The Standard imposed various requirements on manufacturers aimed at ensuring that their employees were informed of the potential hazards posed by chemicals found at their workplace. Specifically, the Standard required chemical manufacturers to label containers of hazardous chemicals with appropriate warnings. "Downstream" manufacturers—commercial purchasers who used the chemicals in their manufacturing plants—were obliged to keep the original labels intact or else transfer the information onto any substitute containers. The Standard also required chemical manufacturers to provide "material safety data sheets" to downstream manufacturers. The data sheets were to list the physical characteristics and hazards of each chemical, the symptoms caused by overexposure, and any pre-existing medical conditions aggravated by exposure. In addition, the data sheets were to recommend safety precautions and first aid and emergency procedures in case of overexposure, and provide a source for additional information. Both chemical manufacturers and downstream manufacturers were required to make the data sheets available to their employees and to provide training on the dangers of the particular hazardous chemicals found at each workplace.

Respondent United Steelworkers of America, among others, challenged the Standard in the Court of Appeals for the Third Circuit. That court held that the Occupational Safety and Health Administration (OSHA) had not adequately explained why the regulation was limited to the manufacturing sector, in view of the OSH Act's clear directive that, to the extent feasible, OSHA is to ensure that no employee suffers material impairment of health from toxic or other harmful agents. The court directed OSHA either to apply the hazard standard rules to workplaces in other sectors or to state reasons why such application would not be feasible. *United Steelworkers of America* v. *Auchter*, 763 F. 2d 728, 739 (CA3 1985).

When DOL responded by initiating an entirely new rulemaking proceeding, the union and its copetitioners sought enforcement of the earlier order. The Third Circuit Court of Appeals directed DOL, under threat of contempt, to publish in the Federal Register within 60 days either a hazard communication standard applicable to all workers covered by the OSH Act or a statement of reasons why such a standard was not feasible on the basis of the existing record, as to each category of excluded workers. *United Steelworkers of America* v. *Pendergrass*, 819 F. 2d 1263, 1270 (CA3 1987).

DOL complied by issuing a revised Hazard Communications Standard that applied to worksites in all sectors of the economy. See 52 Fed. Reg. 31852 (1987). At the same time, DOL submitted the Standard to OMB for review of any paperwork requirements. After holding a public hearing, OMB approved all but three of its provisions. OMB rejected a requirement that employees who work at multi-employer sites (such as construction sites) be provided with data sheets describing the hazardous substances to which they were likely to be exposed, through the activities of any of the companies working at the same site. The provision permitted employers either to exchange data sheets and make them available at their home offices or to maintain all relevant data sheets at a central location on the worksite. 29 CFR § 1910.1200(e)(2) (1988). OMB also disapproved a provision exempting consumer products used in the workplace in the same manner, and resulting in the same frequency and duration of exposure, as in normal consumer use. 29 CFR § 1910.1200(b)(6)(vii) (1988). Finally, OMB vetoed an exemption for drugs sold in solid, final form for direct administration to patients. 29 CFR § 1910.1200(b)(6)(viii) (1988). See 52 Fed. Reg. 46076 (1987).

OMB disapproved these provisions based on its determination that the requirements were not necessary to protect employees.[1] OMB's objection to the exemptions was that they were too narrow, and that the Standard, therefore, applied to situations in which disclosure did not benefit employees.[2] *Id.*, at 46077–46078. DOL disagreed with OMB's assessment, but it published notice that the three provisions were withdrawn. DOL added its reasons for believing that the provisions were necessary, proposed that they be retained, and invited public comment. 53 Fed. Reg. 29822 (1988).

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[1] OMB concluded that workers on multi-employer sites would be adequately protected if each employer kept chemical manufacturers' labels intact, supplied data sheets to other employers on the site on request, and taught its own employees about the chemicals with which they worked directly and explained how to recognize hazards likely to be introduced by other employers. 52 Fed. Reg. 46077 (1987).

The union and its copetitioners responded by filing a motion for further relief with the Third Circuit. That court ordered DOL to reinstate the OMB-disapproved provisions. The court reasoned that the provisions represented good faith compliance by DOL with the court's prior orders, that OMB lacked authority under the Paperwork Reduction Act to disapprove the provisions and that, therefore, DOL had no legitimate basis for withdrawing them. *United Steelworkers of America* v. *Pendergrass*, 855 F. 2d 108 (1988).

The United States sought review in this Court. We granted certiorari to answer the important question whether the Paperwork Reduction Act authorizes OMB to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties. 490 U. S. —— (1989). We hold that the Paperwork Reduction Act does not give OMB that authority, and therefore affirm.

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[2] The standard promulgated by OSHA had exempted, from any otherwise applicable labeling requirements, all food and drugs subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* (1982 ed.), and all consumer products or hazardous substances subject to a consumer product safety standard or labeling requirements of the Consumer Product Safety Act, 86 Stat. 1207, as amended, 15 U. S. C. § 2051 *et seq.* (1988), or the Federal Hazardous Substances Act, 74 Stat. 372, as amended, 15 U. S. C. § 1261 *et seq.* (1988), or regulations issued under those Acts by the Consumer Product Safety Commission. 29 CFR §§ 1910.1200(b)(5)(ii), 1910.1200(b)(5)(iv) (1988).

OMB wanted OSHA to exempt, in addition, all products packaged in the same form and concentration as a consumer product, whether or not used for the same purpose or with the same exposure, as well as all FDA-regulated drugs handled in the nonmanufacturing sector. 52 Fed. Reg. 46078 (1987). OMB drew its recommended exemption for consumer products from § 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1615, 42 U. S. C. § 9601 et seq. (1982 ed., Supp. V), a provision aimed at informing the general public about chemicals that could cause hazardous conditions during an emergency situation.

II

The Paperwork Reduction Act was enacted in response to one of the less auspicious aspects of the enormous growth of our federal bureaucracy: its seemingly insatiable appetite for data. Outcries from small businesses, individuals, and state and local governments, that they were being buried under demands for paperwork, led Congress to institute controls.[3] Congress designated OMB the overseer of other agencies with respect to paperwork and set forth a comprehensive scheme designed to reduce the paperwork burden. The Act charges OMB with developing uniform policies for efficient information processing, storage and transmittal systems, both within and among agencies. OMB is directed to reduce federal collection of all information by set percentages, establish a Federal Information Locator System, and develop and implement procedures for guarding the privacy of those providing confidential information. See 44 U. S. C. §§ 3504, 3505, 3511 (1982 ed. and Supp. V).

The Act prohibits any federal agency from adopting regulations which impose paperwork requirements on the public unless the information is not available to the agency from another source within the Federal Government, and the agency must formulate a plan for tabulating the information in a useful manner. Agencies are also required to minimize the burden on the public to the extent practicable. See 44 U. S. C. § 3507(a)(1) (1982 ed. and Supp. V). In addition, the Act institutes a second layer of review by OMB for new paperwork requirements. After an agency has satisfied itself that an instrument for collecting information—termed an "information collection request"—is needed, the agency must submit the request to OMB for approval. See 44 U. S. C. § 3507(a)(2) (1982 ed., Supp. V.). If OMB disapproves the request, the agency may not collect the information. See 44 U. S. C. § 3507(a)(3) (1982 ed.).

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[3] See S. Rep. No. 96-930, pp. 3-4, 8 (1980) (S. Rep.); H. R. Rep. No. 96-835, pp. 3, 17 (1980) (H. R. Rep.).

Typical information collection requests include tax forms, medicare forms, financial loan applications, job applications, questionaires, compliance reports and tax or business records. See S. Rep., at 3–4. These information requests share at least one characteristic: The information requested is provided to a federal agency, either directly or indirectly.[4] Agencies impose the requirements on private parties in order to generate information to be used by the agency in pursuing some other purpose. For instance, agencies use these information requests in gathering background on a particular subject to develop the expertise with which to devise or finetune appropriate regulations, amassing diffuse data for processing into useful statistical form, and monitoring business records and compliance reports for signs or proof of nonfeasance to determine when to initiate enforcement measures.

By contrast, disclosure rules do not result in information being made available for agency personnel to use. The promulgation of a disclosure rule is a final agency action that represents a substantive regulatory choice. An agency charged with protecting employees from hazardous chemicals has a variety of regulatory weapons from which to choose: It can ban the chemical altogether; it can mandate specified safety measures, such as gloves or goggles; or it can require labels or other warnings alerting users to dangers and recommended precautions. An agency chooses to impose a warning requirement because it believes that such a requirement is the least intrusive measure that will sufficiently protect the public, not because the measure is a means of acquiring information useful in performing some other agency function.

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[4] Tax and business records are examples of information provided only indirectly to an agency. In these cases, the governing regulations do not require records to be sent to the agency; they require only that records be kept on hand for possible examination as part of a compliance review.

No provision of the Act expressly declares whether Congress intended the Paperwork Reduction Act to apply to disclosure rules as well as information-gathering rules. The Act applies to "information collection requests" by a federal agency which are defined as

> "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information." 44 U. S. C. § 3502 (11) (1982 ed., Supp. V).

"Collection of information," in turn, is defined as

> "the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> "(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> "(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes." 44 U. S. C. § 3502(4).

Petitioner urges us to read the words "obtaining or soliciting of facts by an agency through . . . reporting or recordkeeping requirements" as encompassing disclosure rules. It contends that an agency is "soliciting facts" when it requires someone to communicate specified data to a third party and that the Hazard Communications Standard's rules are "reporting and recordkeeping requirements" within the meaning of the Act because the employer is required to report hazard information to employees. Petitioner submits that the provisions requiring labeling and employee training are "reporting requirements" and that the provision requiring accessible data sheets containing health and safety information is a "recordkeeping requirement." We believe, however, that the language, structure, and purpose of the Paperwork Reduction Act reveal that petitioner's position is untenable because Congress did not intend the Act to encompass these or any other third-party disclosure rules.

"On a pure question of statutory construction, our first job is to try to determine congressional intent, using traditional tools of statutory construction." *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 123 (1987). Our "starting point is the language of the statute," *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 5 (1985), but "'in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts* v. *Morash*, 490 U. S. ——, —— (1989), quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987). See also *K Mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291, (1988) (same).

Petitioner's interpretation of "obtaining or soliciting facts by an agency through . . . reporting or recordkeeping requirements" is not the most natural reading of this language. The common-sense view of "obtaining or soliciting facts *by an agency*" is that the phrase refers to an agency's efforts to gather facts for its own use and that Congress used the word "solicit" in addition to the word "obtain" in order to cover information requests that rely on the voluntary cooperation of information suppliers as well as rules which make compliance mandatory. Similarly, data sheets consisting of advisory material on health and safety do not fall within the normal meaning of "records," and a government-imposed reporting requirement customarily requires reports to be made to the government, not training and labels to be given to someone else altogether.

That a more limited reading of the phrase "reporting and recordkeeping requirement" was intended derives some further support from the words surrounding it. The traditional canon of construction, *noscitur a sociis*, dictates that "'words grouped in a list should be given related meaning.'" *Massachusetts* v. *Morash*, *supra*, at ——, quoting *Schreiber*, *supra*, at 8. The other examples listed in the definitions of "information collection request" and "collection of information" are forms for communicating information to the party requesting that information. If "reporting and recordkeeping requirement" is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency, not disclosure rules.

The same conclusion is produced by a consideration of the object and structure of the Act as a whole. See *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 220–221 (1986) (concluding that the meaning of a phrase was clarified by the language and purpose of the act as a whole). Particularly useful is the provision detailing Congress' purposes in enacting the statute. The Act declares that its purposes are:

> "(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;
>
> "(2) to minimize the cost *to the Federal Government* of collecting, maintaining, using, and disseminating information;
>
> "(3) to maximize the usefulness of information collected, maintained, and disseminated *by the Federal Government*;
>
> "(4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;
>
> "(5) to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a man-

> ner which improves service delivery and program management, increases productivity, improves the quality of decisionmaking, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and *for persons who provide information to and for the Federal Government*; and
>
> "(6) to ensure that the collection, maintenance, use and dissemination of information *by the Federal Government* is consistent with applicable laws relating to confidentiality, including . . . the Privacy Act". 44 U. S. C. § 3501 (1982 ed, and Supp. V) (emphasis added).

Disclosure rules present none of the problems Congress sought to solve through the Paperwork Reduction Act, and none of Congress' enumerated purposes would be served by subjecting disclosure rules to the provisions of the Act. The statute makes clear that the first purpose—avoiding a burden on private parties and state and local governments—refers to avoiding "the time, effort, or financial resources expended by persons to provide information *to a Federal agency.*" 44 U. S. C. § 3502(3) (1982 ed.) (defining "burden") (emphasis added). Because Congress expressed concern only for the burden imposed by requirements to provide information to a federal agency, and not for any burden imposed by requirements to provide information to a third party, OMB review of disclosure rules would not further this congressional aim.

Congress' second purpose—minimizing the Federal Government's cost of handling information—also would not be advanced by review of disclosure rules because such rules do not impose any information processing costs on the Federal Government. Because the Federal Government is not the consumer of information "requested" by a disclosure rule nor an intermediary in its dissemination, OMB review of disclosure rules would not serve Congress' third, fourth, fifth, or sixth purposes. Thus, nothing in Congress' itemized and exhaustive textual description of its reasons for enacting this particular Act indicates any legislative purpose to have OMB screen proposed disclosure rules. We find this to be strong evidence that Congress did not intend the Act to authorize OMB review of such regulations.

This conclusion is buttressed by the language and import of other provisions of the Act. For instance, every federal agency is required to take three internal preliminary steps before adopting an information collection request. The agency must take action to

> "(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;
>
> "(B) reduce to the extent practicable and appropriate the burden on persons who will provide information *to the agency*; and
>
> "(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public." 44 U. S. C. § 3507(a)(1) (1982 ed.) (emphasis added).

These requirements affect agencies only when they gather information for their own use. The first directs an agency not to ask for information that it can acquire from another agency.[5] The second requires an agency to consider the burden it places on the public, but only as to information provided *to the agency*. The third encourages an agency to make the information it has obtained useful to others as well. Significantly, no provision relates to disclosure rules. For example, no provision requires agencies to ensure that a paperwork requirement is effective or that its burden on one party is not disproportionate to the benefit afforded a third party.

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[5] See H. R. Rep., at 28 (the agency "is to eliminate any information collections which seek to obtain information available from other sources within the Federal Government").

Also instructive are the provisions governing OMB's review of proposed agency information collection requests that cast that review in terms applicable to information-gathering regulations but not to disclosure rules. OMB's examination is limited to "determining whether the collection of information *by an agency* is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility *for the agency.*" 44 U. S. C. § 3504(c)(2) (1982 ed.) (emphasis added). "Practical utility" is defined in the statute as "the ability *of an agency* to use information it collects, particularly the capability to process such information in a timely and useful fashion." 44 U. S. C. § 3502(16) (1982 ed., Supp. V) (emphasis added).

However, in reviewing the disclosure rules at issue in this case, OMB was unable to consider what OSHA planned to do with information regarding hazardous chemicals at the various worksites, because OSHA was not to be the recipient of this information. Nothing was to be given to OSHA to process—in a timely fashion or otherwise. OMB instead disapproved the three OSHA rules on the ground that the mandated disclosures would be of little benefit *to the employees* OSHA sought to protect. But there is no indication in the Paperwork Reduction Act that OMB is authorized to determine the usefulness of agency-adopted warning requirements to those being warned. To the contrary, Congress focused exclusively on the utility of the information *to the agency*. And the only criteria specified are whether the agency can process the information quickly and use it in pursuit of its substantive mandate.

Yet a third provision reinforcing our conclusion that disclosure rules are not subject to the Paperwork Reduction Act is the statute's mechanism for assuring agency compliance with its terms. When OMB approves an information collection request, it issues a control number which is placed on all forms. If a request does not receive OMB approval, it is not issued a control number and the agency is prohibited from collecting the information. See 44 U. S. C. §§ 3504(c)(3)(A), 3507(f) (1982 ed.). In addition, if the agency nevertheless promulgates the paperwork requirement, members of the public may ignore it without risk of penalty. See 44 U. S. C. § 3512. (1982 ed.).[6] However, this protection of the public is applicable only to information-gathering rules. Section 3512 provides that "no person shall be subject to any penalty for failing to maintain or provide information *to any agency* if the information collection request involved . . . does not display a current control number assigned by the [OMB] . . . ." *Ibid.* (emphasis added).

While the grammar of this text can be faulted, its meaning is clear: the public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information *for an agency* or provide information *to an agency*. By its very terms, the statute's enforcement mechanism does not apply to rules which require disclosure to a third party rather than to a federal agency. Thus either Congress intended the Paperwork Reduction Act to cover information-gathering rules only, or Congress intended the Act to cover disclosure rules but intended to exempt them from this agency compliance mechanism. Because the latter is counterintuitive and contrary to clear legislative history,[7] § 3512 is further evidence that Congress did not intend the Act to cover disclosure rules.

III

For the foregoing reasons, we find that the terms "collection of information" and "information collection request," when considered in light of the language and structure of the Act as a whole, refer solely to the collection of information by, or for the use of, a federal agency; they cannot reasonably be interpreted to cover rules mandating disclosure of information to a third party. In addition, we find unpersuasive petitioners' claims that there is a "clearly expressed legislative intention [to the] contrary," see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432, n. 12 (1987).

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[6] See *Id.*, at 20 (The Act "allow[s] the public, by refusing to answer these [information collection requests], to help control 'outlaw forms'").

[7] See S. Rep., at 52–53 ("The only collections of information by a Federal agency which are exempted, and for which a person or persons could not claim protection under section 3512, are those collections of information which this chapter does not apply to and are exempted by section 3518 [cer-

Petitioner relies on statements from various stages of the Act's legislative history as evidence that Congress intended "collection of information" to include disclosure rules.[8] However, the statements show merely that the Act was intended to reach not only statistical compilations but also information collected for law enforcement purposes and information filed with an agency for possible dissemination to the public (*i. e.*, when the agency is an intermediary in the

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tain law enforcement and natural security exceptions]"). See also H. R. Rep., at 30.

[8] See Report of Comm'n on Federal Paperwork, The Reports Clearance Process 1, 43 (Sept. 9, 1977) (explaining that the Federal Trade Commission did not interpret the Federal Reports Act, predecessor to the Paperwork Reduction Act, to apply to information it collected for law enforcement purposes nor did the Securities and Exchange Commission interpret that Act to apply to information the SEC collected for possible disclosure by the agency to the public); Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess., 87 (1979) (testimony of SEC Commissioner Evans that the definition of collection of information in the Federal Reports Act was limited to collection for statistical purposes; testimony of Sen. Chiles that Congress was not trying to cripple the mission of the agencies but was "trying to put some governor on this thirst for information"); S. Rep., at 39–40 (explaining that the Senate had rejected SEC's attempt to limit "collection of information" to collection for statistical purposes, that the definition extended to documents filed with the SEC for possible disclosure to the public by the SEC, and that OMB's review of these filing requirements should consider whether the SEC could use the data either to carry out its regulatory functions or to make it available to the public).

process of data dissemination). This sheds no light on the issue before this Court: Whether the Act reaches rules mandating disclosure by one party directly to a third party. Moreover, other statements in the committee reports reinforce respondents' position.[9]

Because we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation.[10] See *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U. S. 361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter"). We affirm the judgment of the Third Circuit insofar as it held that the Paperwork Reduction Act does not give OMB the authority to review agency rules mandating disclosure by regulated entities to third parties.[11]

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[9] See, *e. g.*, H. R. Rep., at 3 (the Act resulted from "a growing concern that the way *the Government collects, uses, and disseminates* information must be improved") (emphasis added); *Id.*, at 22 (explaining the "practical utility" review as a response to the tendency of agencies to "collect reams of data on the basis of need only to store the data unused" thereby imposing "an unnecessary reporting burden on those individuals or organizations being asked to provide it"); S. Rep., at 11 ("the essential purpose of the legislation [is] to reduce the burden on the public in providing information *to the Federal Government*") (emphasis added); *id.*, at 46 ("A Federal agency is considered to 'sponsor' the collection of information if the agency itself collects information or if it uses a procurement contract and the contractor collects information for the agency"); Senate Hearings, *supra* n. 8, at 40–41 (testimony of Wayne G. Granquist, Assoc. Dir., OMB) ("No one questions the basic need of the government for information to plan, make policy decisions, operate and evaluate programs, and perform necessary research. The question is rather how much information is essential").

[10] OMB's assumption of the authority to review the three provisions of the Hazard Communications Standard at issue was consistent with its own regulations. See 5 CFR § 1320.7(c)(2) (1988) ("Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the 'collection of information' whenever the same requirment to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency"); § 1320.7(q) (defining "reporting requirement" as "a requirement imposed by an agency on persons to provide information to another person or to the agency"). Petitioners' argument that we should defer to OMB's interpretation, as expressed in these regulations, is foreclosed by our finding of clear congressional intent.

It is so ordered.

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[11] We do not reach the question whether other provisions of the Hazard Communications Standard might legitimately be subject to OMB review under the Paperwork Reduction Act. See 29 C. F. R. § 1910.1200(e) (1988) (requiring employers to develop written programs describing their compliance and make them available to the agency on request); § 1910.1200(g)(11) (requiring employers to make their material safety data sheets available to the agency on request). Only the three provisions OMB disapproved are before us today.

SUPREME COURT OF THE UNITED STATES

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,
PETITIONERS *v.* UNITED STEELWORKERS
OF AMERICA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February 21, 1990]

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion today requires more than ten pages, including a review of numerous statutory provisions and legislative history, to conclude that the Paperwork Reduction Act of 1980 (PRA or Act) is clear and unambiguous on the question of whether it applies to agency directives to private parties to collect specified information and disseminate or make it available to third parties. On the basis of that questionable conclusion, the Court refuses to give *any* deference to the Office of Management and Budget's (OMB's) longstanding and consistently applied interpretation that such requirements fall within the Act's scope. Because in my view the Act is not clear in that regard and deference is due OMB under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), I respectfully dissent.

In *Chevron, supra*, we set forth the general principles to be applied in cases such as this one:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at

> issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 842–843 (footnotes omitted).

As the Court acknowledges, there is no question in this case that OMB is the agency charged with administering the PRA. Unless Congress has directly spoken to the issue of whether an agency request that private parties disclose to or maintain for third parties information such as material safety data sheets (MSDS's) is an "information collection request" or a "recordkeeping requirement" within the Act's scope, OMB's interpretation of the Act is entitled to deference, provided of course that it is based on a permissible construction of the statute.

The Court concedes that the Act does not expressly address "whether Congress intended the Paperwork Reduction Act to apply to disclosure rules as well as information-gathering rules." *Ante*, at 7. Curiously, the Court then almost immediately asserts that interpreting the Act to provide coverage for disclosure requests is untenable. *Ante*, at 8. The plain language of the Act, however, suggests the contrary. Indeed, the Court appears to acknowledge that Petitioners' interpretation of the Act, although not the one the Court prefers, is nonetheless reasonable: "Petitioner's interpretation . . . is not the *most* natural reading of this language." *Ante*, at 8 (emphasis added). The Court goes on to arrive at what it believes is the *most* reasonable of plausible interpretations; it cannot rationally conclude that its interpretation is the *only* one that Congress could possibly have intended. The Court neglects to even mention that the only other Court of Appeals besides the Third Circuit in this case to address a similar question rejected the interpretation that the Court now adopts.[1] In addition, there is evidence that for years OMB has been reviewing proposals similar to the standard at issue in this case routinely and without objection from other agencies.[2] As I see it, by independently construing the statute rather than asking if the agency's interpretation is a permissible one and deferring to it if that is the case, the Court's approach is clearly contrary to *Chevron.*

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[1] In *Action Alliance of Senior Citizens of Philadelphia* v. *Bowen*, 269 U. S. App. D. C. 463, 846 F. 2d 1449 (1988), the court rejected an argument that the Federal Reports Act of 1942, 44 U. S. C. § 3501 *et seq.* (1976 ed.), the PRA's predecessor, did not cover an agency request that private parties conduct self-evaluations which should then be made available to the public and the agency upon request. The court stated:

> The claim is pure pettifoggery. Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the recordkeeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term 'collection of information' for nearly half a century to encompass '[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information.' Regulation A, Federal Reporting Services, Clearance of Plans and Reports Forms, Title I(1)(e) (February 13, 1943) . . . . Even under the deference we owe the agency, *Chevron U. S. A., Inc.* v. *Natural Resources Defense Council* [, *Inc.*, 467 U. S. 837, 842–845 (1984)], we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of 'collection of information.' Happily we confront no such oddity. 269 U. S. App. D. C., at 467–468, 846 F. 2d, at 1453–1454 (emphasis in original).

Notably, by enacting the PRA Congress intended to *expand* the scope of authority OMB and its predecessor had been given under the Reports Act. See Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess. 24–60, 119–125 (1979) (hereinafter S. 1411 Hearings) (comments of OMB and the Comptroller General noting that the proposed legislation would cure deficiencies in the coverage of the Federal Reports Act); S. Rep. No. 96–930, p. 13 (1980).

The hazard communication standards propounded by OSHA require chemical manufacturers to develop hazard information about their products, to adequately label such products, and to prepare for their products MSDS's to be sent to downstream employers who utilize those products. See 29 CFR §§ 1910.1200(d), (f) and (g) (1988). Those employers are directed to prepare written hazard communication programs that include a list of hazardous chemicals known to be present at the work site, § 1910.1200(e); to ensure that containers are properly labeled, § 1900.1200(f); and to collect, maintain, and make available to their employees copies of MSDS's with respect to hazardous chemicals that they use in their business. § 1910.1200(g).

OMB, as I see it, reasonably concluded that these requirements were subject to its approval under the PRA, which makes OMB responsible for implementing the statutory purpose of minimizing the burden and maximizing the usefulness of the Government's information collection requirements. OMB is instructed to do this through a process of reviewing agency "information collection requests" in order to determine whether "the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency." 44 U. S. C. § 3504(c)(2) (1982 ed.).

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[2] For example, OMB has reviewed Environmental Protection Agency community right-to-know disclosure requests, 52 Fed. Reg. 38344, 38364 (1987), Federal Trade Commission textile fiber products identification disclosure and fair packaging and fair labeling disclosure requests, 53 Fed. Reg. 5986, 5987 (1988), and Food and Drug Administration nutrition labels. 52 Fed. Reg. 28607 (1987). In this case, the Secretary of Labor and OMB have consistently agreed that the hazard communication standard is subject to review under the Act. See 47 Fed. Reg. 12092, 12111 (1982); 48 Fed. Reg. 53280 (1983); 52 Fed. Reg. 31852, 31870 (1987); 53 Fed. Reg. 29822, 29826, 29849–29850 (1988). Courts should be particularly reluctant to intervene in the regulatory process when the executive agencies have been able to cooperate effectively.

An "information collection request" is defined as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or similar method calling for the collection of information." 44 U. S. C. § 3502(11) (1982 ed., Supp V). A "recordkeeping requirement" is defined as "a requirement imposed by an agency on persons to maintain specified records." § 3502(17). "Collection of information" is defined as

> "the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> "(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> "(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes." 44 U. S. C. § 3502(4) (1982 ed.).

"Reporting requirement" is not specifically defined by the statute.

As it is directed to do by the PRA, see § 3516, OMB has issued regulations and rules for exercising its authority under the statute. Although the statute itself does not in so many words reach agency directives to collect, disseminate, or make available to third parties specified information that is not delivered to the agency itself, OMB regulations so interpret the Act. The regulations also plainly reach the hazard communications standards that OSHA has presented for OMB's approval in this case.[3]

I cannot say that these regulations, so far as they are involved here, are inconsistent with the Act. It is not unreasonable to characterize as a "reporting requirement" an employer's obligation to disclose hazard information, by labeling or making MSDS's available, especially in light of the absence of a definition in the statute. Nor is it unreasonable to characterize the obligation to compile copies of MSDS's as a "recordkeeping requirement," or the directive to prepare a hazard communication program with its *list* of dangerous chemicals as an "information collection request" within the meaning of 44 U. S. C. §3502 (1982 ed., Supp. V). Since that definitional section, after including reporting and recordkeeping requirements, concludes with the words "or other similar method calling for the collection of information," it is tenable to conclude that reporting and recordkeeping are among the information collection requests requiring OMB approval.

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[3] Relevant to this case are the following definitions promulgated by OMB as 5 CFR § 1320.7 (1989):

"(c) 'Collection of information' means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the 'obtaining or soliciting of information' includes any requirement or request for persons to obtain, maintain, retain, report, *or publicly disclose information.* In the Act, a 'collection of information requirement' is a type of 'information collection request.' As used in this part, a 'collection of information' refers to the act of collecting information, to the information to be collected, to a plan and/or an instrument calling for the collection of information, or any of these, as appropriate.

"(1) A 'collection of information' includes the use of written report forms, application forms, schedules, questionnaires, *reporting or recordkeeping requirements*, or other similar methods. Similar methods may include . . . *disclosure requirements* [and] *labeling requirements*. . . . .

"(2) Requirements by an agency for a person to obtain or compile information *for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements*, constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within this definition.

. . . . .

"(p) 'Recordkeeping requirement' means a requirement imposed by an agency on persons to maintain specified records and *includes requirements that information be maintained or retained by persons but not necessarily provided to an agency.*

"(q) 'Reporting requirement' means a requirement imposed by an agency on persons to provide information *to another person* or to the agency. Reporting requirements may implicitly or explicitly include related recordkeeping requirements." (Emphasis added.)

Section 3502(4) likewise defines "collection of information" as including reporting and recordkeeping requirements, but that definition begins with the words "the obtaining or soliciting of facts or opinions by an agency" through written report forms, etc. The Court's argument is that this definition limits the PRA to facts or opinions obtained by an agency for its own use and hence excludes recordkeeping, reporting requirements, and information collection designed to inform or benefit third parties such as employees, customers or the public. This argument, however, pays too little attention to the precise language of the provision. First, an agency does not "obtain" information when it imposes a recordkeeping requirement. Second, section 3502(4) not only speaks of "obtaining" facts and opinions by an agency but of the "soliciting" of facts and opinions by an agency. The word "soliciting" would appear to mean something beside "obtaining," and is commonly understood as including a request for another person to perform some act. It is not unreasonable therefore to construe this language as extending OMB's authority to requests for recordkeeping, reporting, and information collection that is intended to benefit third parties but is not delivered to the agency itself.

Furthermore, the Court does not explain why if "information collection requests" and the "collection of information" are limited to agency directives that information be provided *to* the agency, the statutory definitions of those terms explicitly include "recordkeeping requirement[s]." See 44 U. S. C. §§3502(4) and (11) (1982 ed. and Supp. V). One response might be that Congress intended to limit the term "recordkeeping requirement" to records prepared for the agency and which must be provided to the agency upon request. But Congress specifically defined the term "recordkeeping requirement" without including such a limitation and it is unlikely Congress intended to imply such a limitation. An agency can certainly "use" information without collecting and analyzing it or periodically auditing it for compliance or enforcement purposes. It can hardly be said that requiring recordkeeping and reporting for the benefit of employees is not useful to the agency or an appropriate means for the agency to carry out its obligation to provide a safe work place.

It is common ground in this case that if the information required to be reported or made available to employees were first sent to the agency and then distributed to employees, there would be no question about OMB's authority. Likewise, as I understand it, the mere fact that the records ordered to be kept are not physically delivered to the agency does not bar OMB jurisdiction, so long as the records are kept for examination and use by the agency. The Court concedes as much, noting that requests for information provided indirectly to an agency, such as requirments that tax and business records be kept on hand, fall within the PRA's scope because those documents are subject to "possible examination as part of a compliance review." *Ante*, at 6, and n. 4.

In support of its argument that the Act applies only when information is actually transmitted to an agency, the Court points to language in the Act's general statement of purpose indicating that Congress was concerned with minimizing "'the cost to the Federal Government,'" maximizing "'the usefulness of information collected, maintained, and disseminated by the Federal Government,'" and reducing the paperwork burdens "'for persons who provide information to and for the Federal Government.'" *Ante*, at 9–10 (emphasis deleted), quoting 44 U. S. C. § 3501. The Court ignores, however, the very first statement of purpose in the Act which declares that Congress intends that the Act "minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." 44 U. S. C. § 3501(1) (1982 ed.). Reading the Court's discussion of the Act, one might think that Congress was only concerned with minimizing the Government's costs and reducing the paperwork burdens on federal agency employees who are forced to process massive amounts of information. Common sense and § 3501(1) clearly belie that conclusion.[4] Complaints from the private sector about bureaucratic red tape far predate the enactment of the PRA.

Also curious is the Court's reliance on the statement that one purpose of the Act was to reduce the paperwork burden "for persons who provide information to and *for* the Federal Government." See 44 U. S. C. § 3501(5) (1982 ed., Supp. V). Aside from reiterating the point just made regarding the Act's focus on reducing the paperwork burdens on the private sector, the natural reading of the statement is that Congress recognized that agencies may sometimes request that private parties provide information to others as part of an agency's administration of its duties. It is surely reasonable to conclude that the word "for" means something different than the word "to" and that it includes not only situations in which private parties must keep records available for use and review by an agency, but also requirements that private parties collect and provide information to third parties.

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[4] In this same vein, § 3504, in setting forth OMB's authority and functions in administering the Act, directs that the information collection request clearance and other paperwork control functions of the Office shall include "setting goals for reduction of the burdens of Federal information collection requests." 44 U. S. C. § 3504(c)(5) (1982 ed.). See also § 3505(1), which directs OMB to set goals to reduce the paperwork burdens by specified percentages, as well as § 3507(a)(1)'s requirement that agencies take action to reduce the paperwork burden of a proposal before submitting such proposals to OMB.

Contrary to the Court's assertions, disclosure requests do present some of the problems Congress sought to solve through the PRA. The Court concedes that Congress intended the Act to apply when information is "filed with an agency for possible dissemination to the public (*i. e.*, when the agency is an intermediary in the process of data dissemination)." *Ante*, at 14–15. But if that is true, how can it be so clear that Congress intended to permit agencies to bypass the Act by simply requesting private parties to submit information directly to third parties? From a policy perspective, and certainly from the private sector's perspective, it makes little difference whether an agency collects information and then disseminates it or requires those in possession of the information to submit it directly to the relevant third parties. In fact, the latter option generally will impose *greater* paperwork burdens on private parties, although either choice results in a federal agency imposing major paperwork burdens on the private sector. The Court's response is that one approach imposes costs on the Federal Government and the other does not. But that distinction is flawed because it promotes a secondary objective of the PRA and ignores what I consider to have been Congress's primary objective in enacting the statute.

In addition, the legislative history on which the Court relies is unconvincing. Like the statute itself, the legislative history never expressly addresses the question of disclosure requirements. Of course, the Court can find and cite to legislative history that is allegedly relevant to and supports its interpretation of the statute, but one can just as easily point to legislative history of similar quality supporting an alternative construction of the Act. See *ante*, at 14–15, and nn. 8, 9.[5]

Since the statute itself is not clear and unambiguous, the legislative history is muddy at best, and OMB has given the statute what I believe is a permissible construction, I cannot agree with the outcome the Court reaches. If *Chevron* is to have meaning, it must apply when a statute is as ambiguous on the issue at hand as the PRA is on the subject of disclosure requirements. Contrary to the Court of Appeals and to the majority, I would defer to OMB's position that the obligation to compile copies of MSDS's and the labeling requirements are information collection requests subject to its approval. It follows that OMB was not acting contrary to the statute in disapproving the three provisions specifically involved in this case.

But even accepting for the moment the Court's construction of the statute, it is notable that the Court fails to consider whether the requirement that employers at multi-employer worksites file all of the relevant MSDS's in a central location or exchange them and make them available at their home offices, see 29 CFR § 1910.1200(e)(2) (1988), might be considered a "recordkeeping requirement." Granted, one purpose of the multi-employer standard is to provide workers with an opportunity to learn the dangers associated with the handling of particular materials used on the worksite; nonetheless, the proposed standard does not require employers to actually disseminate the MSDS's to their workers. Rather it requires them to physically compile and maintain massive quantities of paperwork at multi-employer job sites, such as construction sites, or their home offices. This requirement certainly looks like a "recordkeeping requirement" in the plainest sense of the term. In addition, the Department of Labor may periodically check these records for compliance with substantive requirements. See §§ 1910.1200(e)(4) and

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[5] In particular, see S. 1411 Hearings, at 61–87; H. R. Rep. No. 96–835, pp. 18–23 (1980); S. Rep. No. 96–930, pp. 13, 39–40 (1980).

(g)(11), a factor the Court emphasizes in describing which recordkeeping requests are subject to the Act. As I see it, even under the Court's interpretation of the Act, this portion of the standard should be subject to OMB review.

Finally, an argument that the Court does not make but which the United Steelworkers do is that *Chevron* should not apply in this case because OMB's regulations actually determine the scope of its jurisdiction under the Act. This Court has never accepted that argument and in fact, as JUSTICE SCALIA pointed out in his lucid concurrence in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354 , —— (1988), there are good reasons not to accept it, reasons which JUSTICE SCALIA has adequately set forth and which I will not repeat here. I note, however, that *Chevron* itself and several of our cases decided since *Chevron* have deferred to agencies' determinations of matters that affect their own statutory jurisdiction.[6] See, e. g., *Massachusetts* v. *Morash*, 490 U. S. ——, —— - —— (1989); *K Mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 292–293 (1988); *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 114–116 (1988); *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 123–128 (1987); *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 233 (1986); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 845 (1986); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council,*

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[6] In any event, the PRA itself provides a check on OMB's ability to expand its jurisdiction, at least with respect to independent regulatory agencies. Section 3507(c) provides as follows:

"Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency . . . may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, [and] shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years."

Inc., 470 U. S. 116, 125–126 (1985). The application of *Chevron* principles cannot be avoided on this basis.

For the foregoing reasons, I respectfully dissent.

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March 6, 1990

Senator John Glenn
c/o Harry Broadman
Committee on Governmental Affairs
United States Senate
Washington, D.C.

Dear Senator Glenn:

This will respond to your request for my views on the implications of *Dole v. Steelworkers*, 58 U.S.L.W. 4200 (1990), for S. 1742. In a nutshell: *Dole* has no implications for the bill.

The *Dole* case was a simple one. There the Supreme Court held that in its current form, the Paperwork Reduction Act (Act) does not grant the Office of Management and Budget (OMB) the legal authority to review regulations which require regulated entities to *disclose information* to employees. According to the Court, no provision of the Act provides OMB with power over disclosure rules. Instead, the Act only gives OMB reviewing power over "requirements to provide information *to a federal agency*." 58 U.S.L.W. at 4203 (emphasis added).

This is an important ruling, but it is an exceedingly narrow one. The decision does not bear in the slightest on (a) any constitutional issue at all, (b) the general question of *regulatory* (as opposed to paperwork) review, which OMB may conduct under the current Executive Orders, (c) any question of policy associated with either regulatory or paperwork review, or (d) the basic framework of S. 1742. The only implication of *Dole* is that it makes clear that *if* Congress wants OMB to be able to review disclosure rules under the Paperwork Reduction Act, it must now say, in S. 1742 or elsewhere, that it wants OMB to be able to do so. But the case has no real bearing on the Committee's deliberations thus far (as I understand them) on S. 1742.

I hope that these comments are helpful.

Sincerely,

Cass R. Sunstein
Karl N. Llewellyn Professor
of Jurisprudence

CRS/nbi

OMB WATCH

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February 22, 1990

The Honorable Jeff Bingaman
U. S. Senate
524 Senate Hart Office Building
Washington, D.C. 20510

Dear Senator Bingaman:

During yesterday's hearing we were all caught mid-sentence, as it were, by news of the Supreme Court's decision in Dole v. United Steelworkers. My immediate reaction was that the matter was now settled, but that if Congress felt it must address the issue through reauthorization, it should support the Court's decision. Now that I have had an opportunity to read the opinion, I would like to make a few more comments to respond to your question. I would also ask that this letter be made a part of the record of the Senate Governmental Affairs Committee's hearing on S. 1742.

The Court's decision in the "Haz Comm" case is an important ruling. It also is the correct ruling. Congress should agree with the Court's interpretation of the Paperwork Reduction Act, and should either accept the decision or amend the Act to explicitly exempt labeling, disclosure, and other third party notice requirements from the paperwork clearance process.

As you know, OIRA has an arsenal of weapons with which to affect regulatory requirements like the Hazard Communication Standard. In addition to paperwork clearance, there is the regulatory review process created by Executive Orders 12291 and 12498. Thus, keeping disclosure requirements out of the Paperwork Reduction Act is only part of the issue. We believe Congress must also address OIRA's reach into regulations through regulatory review. For this reason, we support the procedural protections that your bill, S. 1742, would impose on OIRA regulatory review, and call for increased congressional oversight of OIRA's involvement in Federal agency regulatory activities.

Accordingly, we would not support an attempt to overrule the Haz Comm decision by amending the Paperwork Reduction Act to permit OMB paperwork review of disclosure requirements. This would be ill-advised for at least three reasons:

(1) **It would damage the information management focus of the Paperwork Reduction Act;**

(2) **Given the record of OMB's interference in the substance of agency regulatory decisions, it would invite, and actually legitimize, further OMB usurpation of agency decision-making authority; and**

(3) **It would amount to a too-sudden foray into the very difficult area of regulatory reform, and even though made in the context of paperwork reduction, it would create a legislative mandate for regulatory review.**

For these three reasons we recommend most strenuously that disclosure requirements be kept out of the purview of the Paperwork Reduction Act. Our thinking behind this position is as follows.

First, the Paperwork Reduction Act is not the appropriate vehicle, under any circumstances, for allowing OMB to review the substance of agency regulations. When the Act was enacted in 1980, Congress acknowledged that in order to reduce paperwork, OMB would have to examine the information collection burdens of regulations. It said, however, that it did "not intend that 'regulatory reform' issues which go beyond the scope of information management and burden be assigned to the Office." (Senate Report No. 96-930, September 8, 1980, pp. 8-9).

The explicit purpose of the Act is to improve the management of federal information resources. Congress will do a real service to the important purposes of the Act if it strengthens that IRM focus -- this is a major purpose of your bill to reauthorize the Act (S. 1742). As you know, this is critically needed as we enter the 1990's and begin to appreciate the true dynamics of the Information Age.

Second, if Congress turns from the explicit concern for information management to an attempt to attack agency regulatory decision-making, it will not only frustrate the purposes of the Act, but also will strengthen OMB's hand and drag the Act into even more rancorous debate over competing regulatory strategies.

The record of OMB involvement in agency decision-making under the Paperwork Reduction Act and Executive Orders 12291 and 12498 evidences OMB's belief that it is qualified and is authorized to review and control the substance of Federal agency regulatory decisions. If this belief is supported by an act of Congress, it will only embolden OMB to even more aggressively insinuate itself into agency decision-making. Moreover, you can be sure that such congressional action will be used by OMB and its supporters as a legislative mandate for such review. The end result would be:

- **More of the same regulatory review** -- targeted against health and safety regulations, as we showed in our testimony;

- **More of the same paperwork reduction** -- also targeted against health and safety activities, as both GAO and we have shown; and

- **Even less concern for information resources management** -- from the initial implementation of the Act on, GAO has repeatedly pointed out OMB's relative disinterest in fulfilling the IRM functions mandated by the Act.

Third, to enact a requirement into statute that OMB review substantive regulatory decisions such as the disclosure requirements of the Hazard Communications Standard, is fundamentally to enact a statutory regulatory review scheme. This should not be undertaken lightly.

It is one thing for Congress to, at least, temporarily acquiesce to a presidential regulatory review initiative, for example, that mandated by Executive Orders 12291 and 12498. It is quite another matter for Congress to create a regulatory review scheme without consideration of the many difficult issues involved in such a regulatory reform effort. This includes the principles and procedures of the Administrative Procedure Act and related case law, the delegation doctrine and concepts of administrative discretion, and the principle of the separation of powers between the legislative and executive branches. Lest one minimize the difficulties of addressing these issues, consider the record of regulatory reform legislation in the first years of the 1980's.

This is not to say that these issues should not be addressed by Congress. Quite the contrary, given the record of OMB interference in the substance of agency regulatory decisions, such congressional action is very much needed. The only point is that this should be done in the appropriate context, that is, regulations and administrative law, not paperwork reduction and information management.

These three themes encompass our reasoning for why Congress should not overrule the Haz Comm decision, and why it should not grant OMB substantive regulatory power in the context of the Paperwork Reduction Act. As to the Haz Comm decision itself, we believe a number of additional points are particularly relevant to reauthorization of the Paperwork Reduction Act.

First, in Dole v. United Steelworkers the Court describes information collection requests as efforts "to generate information to be used by the agency in pursuing some other purpose." (p. 6, emphasis added). Disclosure requirements, on the other hand, "do not result in information being made available for agency personnel to use. The promulgation of a disclosure rule is a final agency action that represents a substantive regulatory choice." (p. 6, emphasis added).

This distinction between a instrumental or facilitative function and a substantive or essential function is critical. Like the mechanic who tunes up your car, but does not tell you where to drive, the Paperwork Reduction Act is meant to assist in the efficient and effective management of information collection activities undertaken by agencies in the course of their underlying substantive activities. It is not meant to be an avenue for OMB to control those underlying agency decisions. To the extent OMB is involved at that substantive level, OMB is displacing the discretion delegated to agencies by Congress.

Second, at yesterday's hearing there was considerable discussion about the extent to which politics influences OIRA decision-making. For his part, OIRA Acting Administrator James MacRae claimed that OMB staff simply do not play "politics." For the record, I thought you might be interested in a memorandum for then-OIRA Administrator Jay Plager by OIRA Desk Officer Shannah Koss-McCallum that was passed through Jim MacRae. The memo addresses health messages on food labels, an issue of considerable interest to you, and one clearly covered by the Haz Comm decision.

At one point, Koss-McCallum states: "OIRA staff believe that what FDA has done is so antithetical to the Administration's previous stand on this issue, and so contrary to the concept of commercial free speech, that not issuing a rule and continuing case-by-case enforcement efforts would be better than adopting the rule as currently drafted [by FDA]." (see enclosure, at pp. 1-2.)

In our work monitoring OMB paperwork and regulatory decisions, we have come across many such memos and decisions where OIRA Desk Officers attempt to impose a political agenda on agencies -- sometimes they represent Administration positions, sometimes they involve the personal beliefs of individual Desk Officers. When confronted with evidence of such political decisions, OMB officials usually minimize their impact. For example, when asked at a hearing about OIRA's role in the FDA health claims rule, MacRae and Koss-

McCallum told Rep. Ted Weiss that OIRA simply provides advice to agencies, nothing more. When confronted with the Koss-McCallum memo, they argued, at first, that it was merely an internal communication, and later, that it was only a preliminary discussion piece (Hearings, House Government Operations Committee, Subcommittee on Human Resources and Intergovernmental Relations, October 31 and November 9, 1989).

However it is characterized, the Koss-McCallum memo is, in our estimation, the rule rather than the exception to the sort of positions taken by OMB, and the communications made by OIRA Desk Officers to agencies. The fact is that OIRA Desk Officers have enormous power to impose ideological objectives on agencies and this clearly politicizes agency decision-making.

That it is often difficult to document OIRA's role in an agency decision is also clear from the Koss-McCallum memo when she describes OIRA's preferred style of operation: "We also believe that if you choose this [OIRA staff] option, it should be discussed privately with Commissioner Young. We could provide change pages to share with him. Staff involvement at an early stage would likely result in leaks that could torpedo 6 years worth of effort." (p. 5, last paragraph).

This memo serves as further evidence of the need to limit OIRA's reach into the substance of agency regulatory decicisions. It argues for support of the Supreme Court Haz Comm decision, as well as for placing regulatory review procedural controls in statute, as your bill, S. 1742, does. The public cannot rely on congressional oversight to unveil OIRA interference every time. Congress has neither the time nor the will to micromanage Executive Branch affairs. Statutory protections are essential.

Thank you for considering these additional comments and, again, please make this part of the hearing record to more properly respond to your questions at yesterday's hearing.

Sincerely,

Gary D Bass

Gary D. Bass
Executive Director

Enclosure

NOV 3 - 1988

MEMORANDUM FOR: JAY PLAGER

THROUGH: Jim MacRae
John Morrall
Dick Eisinger

FROM: Shannah Koss-McCallum

SUBJECT: FDA's Final Rule on Health Messages

Background

Since 1984, when Kelloggs included a statement on the relationship between bran and the risks of cancer, there has been an ongoing debate within the Administration and among all interested parties about what, if anything, should be permitted as a legitimate health message on a food label. On August 4, 1987, after extensive discussion, FDA published a proposed rule that would have allowed a manufacturer to place on a food label any health message meeting the criteria contained in the rule.

The criteria were: 1) the claim is truthful and not misleading; 2) the claim is supported by valid, reliable, publicly available scientific evidence derived from well-designed and conducted studies consistent with generally accepted scientific procedures and principles performed and evaluated by persons qualified by expertise and training in the appropriate disciplines; 3) the claim is consistent with generally recognized medical and nutritional principles for a sound total dietary pattern; and 4) the food is labeled in accordance with the requirements of this section (i.e., nutrition labeling requirements). The approach established in the NPRM was first laid out by Doug Ginsburg, and later agreed to by both Dave Stockman and Jim Miller. OIRA staff pressed long and hard for this approach, working closely with FTC staff.

FDA has now submitted a final rule that would undermine this approach by drastically limiting the scope of permissible messages. OIRA staff believe that what FDA has done is so antithetical to the Administration's previous stand on this issue, and so contrary to the concept of commercial free speech, that not issuing a rule and continuing case-by-case enforcement efforts would be better than adopting the rule as currently drafted.

FDA's Draft Final Rule

The draft final rule creates a process through which FDA will develop safe harbor messages that will be accompanied by scientific summaries and consumer health message summaries. The messages and summaries would then be submitted to a public health service committee for review and published for public comment. Once this process is completed, manufactures could use the safe harbor message or similar statements; however, any message that "deviates inappropriately" or discusses a diet/disease relationship for which no safe harbor exists run "substantial risk of regulatory actions."

The criteria set forth in the draft final rule for the health messages themselves are similar to the proposed criteria for the most part. There are two main problems with the final criteria: 1) FDA is moving back toward the need for scientific consensus by requiring that "a significant agreement must exist among qualified experts that the statement is supported by such evidence"; and 2) permissible label statements are limited to diet/disease relationships for which the process has been completed. Both of these regressions are completely contrary to what we have been working towards and would have the effect of undermining the raison d'etre for changing current FDA practice.

Currently, FDA only plans to consider statements in five topic areas: 1) calcium and osteoperosis; 2) sodium and hypertension; 3) lipids and heart disease; 4) lipids and cancer; and 5) fiber and cancer. The reasons for this limited consideration are the belief that these are the areas where sufficient evidence exists and FDA's resource constraints.

Options

1) Approve the rule as it has been submitted. (HHS recommendation)

2) Revise the criteria to allow all truthful and nonmisleading messages (including those in the five topic areas) so long as they meet the substantive criteria. (OIRA staff recommendation)

3) Do not issue a final rule. (OIRA staff back up position if HHS is unwilling to revise the rule)

Analysis

Option 1: Approve the rule as is.

This option would meet one aspect of the Administration's goals, specifically, getting a final rule out. HHS also asserts there is little or no room for negotiation on the substance of the rule, consequently, we would save political energy. Finally, the rule would allow health messages regarding a handful of diet/health relationships. Unfortunately, going forward results in few, if any, other benefits. The approach contained in the final rule is exceedingly regulatory, just short of premarket clearance, and in some respects potentially more prescriptive.

FTC staff have raised a number of concerns with which OIRA concurs. First, FTC is concerned that the extreme regulatory nature could have a spill-over effect on advertising. Second, FTC questions how readily FDA could even complete the envisioned process given its track record on similar efforts, such as OTC monographs. Third, the slowness of the process does not lend itself to the dynamics of the nutrition field. In other words, new findings could not be quickly incorporated in the safe harbor messages, ending up with the possible irony of misleading safe harbor messages. Finally, FDA's proposal may inappropriately limit commercial free speech.

OIRA staff have a number of additional concerns. First, although FDA states it will consider other topic areas it has not initially included some diet/disease relationships that we understand to have sufficient evidence and scientific support. For example: cholesterol and heart disease or oat bran and blood cholesterol. Second, FDA's approach gives no credence to the positive effects of market forces to ensure there is adequate information in the market. Finally, FDA's approach gives no credence to the intelligence of the consumer.

In fact, FDA seems to have ignored the basic findings of its own diet and health survey. Specifically, 83.5 percent of the survey respondents (3,158) want more information on diet and health. When queried about the source from which consumers would like to see this information, more respondents favored food labels than any of the other listed sources. Lastly, consumers show appropriate skepticism about such information -- when asked about their accuracy only 11 percent thought statements about food helping to prevent disease were accurate compared to 34 percent or more for label items such as ingredients.

In light of all of the above arguments going forward with the rule as it is currently drafted would surely do more harm than good.

Option 2: Revise the criteria to allow all truthful and nonmisleading messages.

Under this option the substantive criteria a health message would need to satisfy basically would be the same as in the current FDA proposal with two changes. First, the sentence requiring "significant agreement" among qualified experts would be dropped. Second, a provision would be added to stipulate that a message on certain diet/health relationships such as cholesterol and heart disease could not be made if the effects of other dietary properties in the food, such as lipids, would counteract the potential benefits of the stated message.

This option is designed to clearly allow all truthful and nonmisleading claims whether FDA has completed its process or not. The advantages of this option are as follows: 1) It is neither unduly burdensome or prescriptive; 2) It allows the market to function and gives credence to consumer intelligence; 3) The FDA process is left intact, but will not impede the market's ability to quickly incorporate new information; and 4) It eliminates the problems concerning free speech and effects on advertising. In addition, this option is clearly supportable based upon consumers desires, as evidenced by FDA's own data!

HHS will cite the following as reasons to oppose this approach. First, they will claim it is difficult to enforce because the criteria are too vague and FDA resources too small. Second, FDA will claim that because the field of nutrition, health and disease is dynamic there has to be significant agreement (consensus) among experts otherwise consumers could be mislead by preliminary findings. Third, the FDA process, or more specifically, the resulting consumer health message summary, was to be considered an extension of the label to ensure full and properly balanced information; thus messages for which these have not been developed would by definition be misleading. Finally, this approach would not be responsive to the many comments that said FDA needed to take a more active role, which could include premarket clearance. We believe each of these objections are based upon faulty logic or rationales.

Criteria by their very nature must be somewhat vague if they apply across various circumstances. Enforcement actions and the safe harbor messages FDA develops will help clarify the criteria by example. FDA could also provide examples in the preamble (although we doubt they have any at present).

We agree the nutrition, health and disease field is dynamic, but we feel this warrants a more flexible approach. We do not advocate the use of preliminary data, but we believe when the balance of information warrants a shift in practice this approach would enable a quick response rather than a lapse of time where the permitted information in the market place has become misleading.

The notion that the comprehensive information expected to be in the consumer summary must exist to have a nonmisleading message is ridiculous. This is FDA's paternalism at its height. Consumers must know everything or nothing. In all likelihood most doctors do not tell their patients that much about diet/health relationship, such as, reducing their cholesterol or eating fiber. Perhaps, as a way to address the concern of how to get more information if the consumer wants it, the labels under this option could have a telephone number or address where consumers could get more information e.g., the studies used in support of the message, government publications on diet and health etc.

The issue of comment response has only minimal validity. Although the comments were fairly evenly split for and against the proposed rule, the split was along expected lines, i.e., industry on one side and consumer groups, nutritionist, and doctors on the other side. However, we believe if FDA were a little more explicit about its enforcement efforts and used its own diet and health survey as evidence of consumer opinion it could more than adequately respond to these comments.

In conclusion, OIRA staff with the concurrence of FTC staff, believe the rule must be revised as detailed above if a final rule is issued.

Option 3: Do not issue a final rule.

This option does not have a great deal to recommend it other than it is the status quo. We believe, however, that the status quo is preferable to FDA's overregulated approach. This option is understood as case-by-case enforcement coupled with the current non-enforcement approach on diet/health messages that are acceptable. This gives little guidance to consumers and industry alike but does not create a number of worrisome precedents inherent in FDA's approach.

Recommendation

Option 2: For the reasons discussed above and in keeping with the Administration's position since 1984, we recommend the FDA proposal be revised to allow all truthful and nonmisleading messages that meet the substantive criteria. We also believe that if you choose this option, it should be discussed privately with Commissioner Young. We could provide change pages to share with him. Staff involvement at an early stage would likely result in leaks that could torpedo 6 years worth of effort.

Dan Oliver, FTC, Chairman would be happy to discuss this matter with you.

cc: Official File
Chron
Jim MacRae
John Morrall
Dick Eisinger
Shannah Koss-McCallum

OIRA:HRH:SKOSS-MCCALLUM:dyw 11-3-88

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

February 26, 1990

Mr. Richard Darman
Director
Office of Management and Budget
New Executive Office Building
Washington, D.C. 20503

Dear Director Darman:

I am writing in regards to the recent decision of the United States Supreme Court in the case of Dole v. United Steelworkers of America. The decision raises concerns about the role of the Office of Management and Budget and the responsibilities of agencies regarding OMB review of third-party communications.

One immediate step I believe should be taken to ensure OMB's compliance with the Court's decision is to eliminate the third party communication requirements from the Information Collection Budget (ICB). The ICB's are currently under review at the OMB Office of Information and Regulatory Affairs, agencies are submitting ICB modifications and awaiting OIRA "pass-backs." Based on our reading of the case, agencies should no longer calculate third party communication requirements as "information collection activity" pursuant to the Paperwork Reduction Act.

A second step I believe should be taken by OMB is to inform Federal agencies as soon as possible as to the application of the Supreme Court decision. The initial feedback from agencies reflects considerable confusion as to what material is still subject to the Paperwork Reduction Act. I feel strongly that agency heads should be notified in a timely fashion in order to redefine their obligations under the Paperwork Reduction Act in general, and for the ICB's in particular.

Please provide me with copies of any written communication which OMB sends out regarding the Supreme Court's decision.

Sincerely,

Jeff Bingaman

Jeff Bingaman
Chairman
Subcommittee on Government
Information Regulation

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Congress of the United States
OFFICE OF TECHNOLOGY ASSESSMENT
WASHINGTON, DC 20510-8025

JOHN H. GIBBONS
DIRECTOR

February 15, 1990

The Honorable Jeff Bingaman
Chairman
Subcommittee on Government
Information and Regulation
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

I am pleased to provide OTA's comments on S. 1742, the "Federal Information Resources Management Act of 1989," per your request of January 17, 1990. We have limited our comments to the information management and policy provisions that relate to prior or ongoing OTA studies.

If you have any questions on our comments, please call Dr. Fred Wood in OTA's Communication and Information Technologies Program at 228-6760.

We are pleased to be of assistance in your legislative efforts on this important topic.

Sincerely,

Jack Gibbons

John H. Gibbons

OTA COMMENTS ON THE INFORMATION MANAGEMENT AND POLICY PROVISIONS OF S.1742, THE "FEDERAL INFORMATION RESOURCES MANAGEMENT ACT OF 1989"

OTA has reviewed S.1742 and offers the following comments on selected information management and policy provisions in Title I, "Information Resources Management of Federal Departments and Agencies."

General Comments

The basic rationale for S.1742 appears to be sound. Information technology is a valuable strategic asset of the Federal Government. Electronic information technology is central to (1) modernizing Federal operations and services, and (2) improving the collection, storage, processing, and dissemination of Federal information. The extent of information technology use is shown in the Federal budget. Over $125 billion was spent on information technologies over the last 10 years by Federal agencies. (If the full range of telecommunications and national security applications is included, the figure is at least $200 billion.)

Electronic information technology is the key to improvements in many government functions--from collecting statistics, to controlling air traffic, to making social security payments, to monitoring global climate change. Information technology also offers new opportunities to help renew the U.S. competitive edge through the use of Federal scientific and technical information in the innovation process--including education and basic research, applied research and development, and commercialization. Finally, information technology can help streamline government regulatory processes and promote open government by making government information more readily available to interested citizens and organizations.

The information challenge facing the Federal Government is this: new electronic technologies must be used if the government is to become more cost-effective and responsive in its operations. Government today cannot function without computers and telecommunications. Yet new technology comes at a high price--not just the hardware and software but also the training of personnel, changes in organizational procedures and public policies, and, as important, the institutional willingness to learn and innovate. The last decade has witnessed many examples of failed pilot projects, false starts, unanticipated policy issues, and late or overbudget information programs. Some of the failures are merely the price of innovation, progress, and organizational risk-taking. But this also is reason for organizational guidance and oversight of the Federal Government's information technology initiatives and for frequent updating of Federal information policies to reflect the inevitable transition to computerized government activities.

The Paperwork Reduction Act (PRA) enacted in 1980 was intended to help reduce the Federal paperwork burden and better manage the government's information resources. In its time, the PRA broke new ground by calling attention to the need for an integrated approach to Federal information management, which up until then had been disorganized and fragmented. The PRA assigned responsibility for Federal information management to the Office of Information and

Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), and it designated responsible senior officials in the executive departments and agencies. The PRA was enacted with an eye toward the unfolding advances in information technology.

The microcomputer revolution and the developments in networks that occured in the 1980s were remarkable. The PRA could not have anticipated these developments. It was conceived during the era of mainframe computers and centralized data processing facilities. But technological trends have since worked away from the centralized approach and into an environment of desktop computers and individual users. The Federal inventory of microcomputers is now more than 1.6 million, compared to almost none a decade ago. Many of these microcomputers are linked via networks to electronic databases, record systems, and more powerful computers inside and outside the government. Thus the computer and telecommunications environment of the Federal Government--like the private sector--is decentralized, with many technological choices for the exchange and storage of information.

The PRA also could not anticipate the range of policy issues that arose during the 1980s as the decentralized information technology penetrated an ever increasing range of government activity. In that same time frame, the private telephone system was deregulated and moved into a competitive environment. Many issues that had been addressed and resolved for a paper environment were reopened and intensified in the unfolding electronic environment. These issues range from privacy and security to electronic filing and dissemination to information technology planning and procurement.

The extensive review of the PRA being conducted by the 101st Congress is timely, as the result of a decade of experience and massive changes in information technology and applications. In prior reports, OTA concluded that the PRA is one of the key statutes that needs updating.[1] S.1742 provides a comprehensive approach to the management of Federal information resources. Many of the bill's provisions address points that have been raised in several OTA studies. These are summarized below.

Specific Comments on Title I of S.1742

Purposes. Since 1981, OTA reports have repeatedly emphasized the need for integrating national information policy.[2] S.1742 would reinforce Federal information resource management as "a comprehensive and integrative process for improving the efficiency and effectiveness of Government information activities."[3] Also, S.1742 would help ensure that Federal information management is consistent with other applicable laws, including the Privacy Act, Computer Security Act, Freedom of Information Act, Printing Act, and Depository Library Act, as well as other provisions of the PRA itself.[4] This is an important statement of purpose, since a major deficiency in law noted by earlier OTA reports is the lack of coherent, consistent information laws and policies.[5]

Definitions. Prior OTA reports have pointed to the need for a "life cycle" approach to information management--from collection or creation of information through processing and storage to dissemination and disposition (including archiving where appropriate).[6] Information management must include technological, financial, and human resources, as well as the information and technology systems, to be effective. S.1742 defines information resource managment (IRM) to include the information life cycle, and other resources needed to implement information systems.[7]

The definitions in S.1742 are lengthy, and could be criticized as overly detailed. But in earlier studies, OTA found that Federal agency managers need clear descriptions of IRM terms.[8] The original PRA did not define IRM; 1986 amendments included the first statutory definition of IRM. Agency officials and subsequent independent studies indicate confusion and disagreement over the scope of IRM. S.1742 provides a more complete definition of IRM, which should reduce the ambiguity.

Office of Information and Regulatory Affairs (OIRA). OTA studies have discussed the controversial role of OIRA in Federal information policy.[9] Regardless of one's views on specific policy issues, the accountability of OIRA could and should be strengthened. S.1742 proposes several ways to do this, including: providing a more detailed statutory framework for OIRA information resource management (IRM) activities, especially with respect to Federal statistical collection and information dissemination; holding the OMB Director responsible for OIRA actions; establishing OIRA as a separate line item in the OMB budget; authorizing OIRA appropriations for two years only; and requiring that the OIRA Administrator be qualified in information management. The 1986 PRA amendments required that the OIRA Administrator be appointed with Senate confirmation. S.1742 would add that the OIRA Adminstrator "be appointed with special attention to the professional qualifications and credentials which may include education, work experience, or related professional activities" needed to carry out OIRA functions.[10]

Authority and Functions of the OIRA Administrator. OTA has found that, despite the PRA and prior OIRA efforts, Federal information policies have been poorly coordinated and unevenly developed. Legislation can only partially correct this problem. Committed and skilled OIRA and agency leadership is needed. S.1742 would provide further statutory direction by requiring that the OIRA Administrator:[11]

- give "balanced emphasis" to all aspects of information management and policy;
- coordinate information policy development and implementation with other central agencies (e.g., General Services Administration, National Institute of Standards and Technology) and the mission agencies, in part through the use of interagency working groups;
- insure the development of IRM training programs for the mission agencies and OIRA; and
- initiate and conduct, as appropriate, pilot projects to test or demonstrate innovations in Federal information policies and practices.

S.1742 would provide further guidance on OIRA responsibilities for information collection, statistical policy and coordination, privacy, and information dissemination. Earlier OTA studies have noted the potential of electronic information technology to reduce the burdens of collecting Federal information, such as through electronic filing from remote locations. S.1742 could be revised to emphasize OIRA's responsibility to aggressively pursue this potential.

With regard to statistical information, OTA studies have found that the Federal statistical system has not kept up with the changing nature of the U.S. and global economies.[12] Statistical priorities and programs need to be periodically reexamined and updated in light of rapidly changing economic, technological, social, and political conditions. The U.S. economy is in transition, yet the U.S. statistical system is largely moribund. Leadership and improved coordination are again essential. S.1742 amplifies OIRA's existing statistical responsibilities. The duties of the OIRA Administrator would include:[13]

- "coordinating and providing leadership for development of the Federal statistical system;"
- "ensuring the integrity, objectivity, impartiality, and confidentiality of the Federal statistical system;"
- reviewing statistical agency budgets for consistency with long-range statistical plans;
- "promoting the timely release of statistical data to the public,"
- coordinating U.S. participation in international statistical activities;
- preparing annual reports to Congress on the U.S. statistical budget and policy development; and
- establishing an interagency working group on statistical policy.

These provisions should provide OIRA with ample authority to revitalize the U.S. statistical system. If this is the congressional intent, it is important that the legislative history reinforce the gravity of the problem and the desire by Congress for innovation and fresh thinking about the Nation's statistics. This should include the use of electronic technology for the collection, processing, and dissemination of statistical information.

With regard to privacy, prior OTA studies have concluded that the development of computerized Federal information systems containing personal records is outstripping the existing legal and oversight framework.[14] S.1742 directs the OIRA Administrator to oversee the development of personal record systems, monitor them for compliance with information privacy policies, and recommend further legislation for privacy protection.[15]

Information Dissemination. Prior OTA reports have highlighted the need for legislative guidance on Federal information dissemination policy.[16] The OIRA policy has been controversial and perceived as favoring the privatization of Federal agency information dissemination functions. OTA has suggested that Congress consider enacting its own version of OMB Circular A-130 which provides OMB's guidance on agency information dissemination.

S.1742 establishes, for the first time, a statutory framework for the OIRA Administrator to develop dissemination policy guidance and for agency heads to carry out information dissemination activities. With regard to OIRA, S.1742 directs the Administrator to develop policy guidelines, promote policy research and development, maintain systematic oversight, and coordinate the development of uniform technical standards (with a major role here assigned to the National Institute of Technology and Standards).[17]

The role of OIRA is a matter of continuing debate. Many parties acknowledge the need for some centralized OIRA policy function but they are concerned about excessive OIRA influence and the weak checks and balances on OIRA policy development that currently exist. S.1742 would require that OIRA information dissemination guidance:[18]

- be developed in consultation with governmentwide dissemination agencies (e.g., the National Technical Information Service and Superintendent of Documents);
- "strengthen public access to Government information, regardless of format...," including "making public information products and services available on a timely, equitable, and equal basis to all persons" and "encouraging a diversity of public and private information products and services" and "a public and private sector sharing of responsibility for information dissemination;"
- "maintain an affirmative role for Federal agencies in the dissemination of government information" and asssign the head of each agency the primary responsibility for dissemination; and
- "require an agency, in determining how to fulfill its public information dissemination functions, to consider--
  - (a) "whether dissemination is required by law;"
  - (b) "whether dissemination is necessary for the proper performance of agency functions;"
  - (c) "whether disseminating public information would assist in public oversight of agency operations or would promote the general social or economic welfare of the United States;"
  - (d) "if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service;"

(e) "dissemination methods that will maximize the utility of the information to the public;" and
(f) "the economy and efficiency of government operations."

S.1742 also provides guidance to the Federal agencies that would have primary responsibility for dissemination. S.1742 would require each agency to "establish and maintain an information dissemination management system that shall:"[19]

o "insure that the public has timely, equitable, and equal access to the agency's public information products and services and that agency information dissemination programs disseminate agency public information products and services in an efficient, effective, and economical manner;"

o "plan and budget for information dissemination at the time information is created or collected, and at other appropriate steps during the information life cycle;"

o "provide to the public adequate advance notice when an agency initiates, terminates, or significantly modifies significant public information products and services;" and

o "provides to the Superintendent of Documents for distribution to the Federal Depository Library Program all publications required by chapter 19 of this title [44 USC] to be made available."

In so far as the bill goes, the S.1742 framework is generally consistent with dissemination policy principles or criteria presented as options in earlier OTA reports,[20]

OTA believes that S.1742 and its accompanying committee reports would make an even greater contribution to Federal information dissemination policy if six specific areas were further clarified, whether in statutory language and/or legislative history.

First, S.1742 appears to give priority to ensuring public access to agency information, but is ambiguous about the relative roles of the government and private sectors. Is it congressional intent that agencies have primary responsibility for dissemination of their own information, with an important but complementary or supplemental role for the private sector? If so, language to this effect could be included in the bill and/or the accompanying committee report. If not, that too should be made clear.

Second, S.1742 would require that agencies "consider" related or "equivalent" public or private sector information products and services when making decisions on information dissemination. Is it congressional intent that agencies stay abreast of other related information products and services--whether offered by government agencies, commercial vendors, or not-for-profit organizations--and factor these alternatives into agency dissemination planning and decisionmaking? Is it the further intent that agencies, after considering the alternatives, are to make the decision that best ensures public access and carries out the agency mission, but agencies are not required to use "equivalent" information products and services? The wording is ambiguous and may need clarification, whether in the bill and/or legislative history.

Third, S.1742 would require agencies to provide the Superintendent of Documents with publications for distribution to depository libraries. S.1742 defers to 44 USC for a definition of the publications to be distributed in the depository program. 44 USC does not explicitly mention electronic formats, although both the Government Printing

Office and Joint Committee on Printing have interpreted the law as extending to electronic media. S.1742 could be changed to address this issue. (Previous OTA studies concluded that electronic formats should be included, if the broad scope of the depository program is to continue.[21]) H.R.3695, the House version of the PRA reauthorization bill, extends the depository requirement to include "government publications in electronic formats."[22] H.R.3849, a House bill to amend the printing and depository library chapters of 44 USC, would also extend the depository program to include off-line electronic formats, and to online electronic forms (the latter if cost sharing and operational issues can be resolved).[23] S.1742 could adopt language similar to H.R.3695 or H.R.3849, or could clarify the role of electronic formats in report language.

Fourth, S.1742 places primary emphasis on individual Federal agencies for implementing information dissemination programs and policies. S.1742 assigns OIRA an oversight role to help ensure that agencies carry out congressional intent. Earlier OTA reports documented the controversial results of OIRA's approach to dissemination and the interpretation of congressional intent.[24] S.1742 presumably establishes legislative principles of information dissemination policy that are binding for both the mission agencies and OIRA. OTA's reading is that OIRA's discretion would be limited to developing guidelines to the agencies implementing these principles, and that legislative action would be required to change these principles. If this is the intent of S.1742, it could be made clearer in the legislative history.

Fifth, S.1742 does not specifically address the topics of value-added services, user fees, and licensing agreements for Federal information dissemination. Prior OTA reports have identified these as important issues.[25] S.1742 does emphasize the need for "timely, equitable, and equal" public access to Federal information, but does not elaborate further. OTA has previously concluded that Federal agencies have an appropriate role in disseminating not only raw data or documents, but also the software, indexes, and technical documentation necessary to make the data or documents useful.[26] Private vendors could and frequently do add further value and enhancements to develop commercial products and services based on Federal information. S.1742 could be amended to include language similar to H.R.3695 that requires agencies "to the greatest extent practicable to disseminate in usable electronic formats (in whole or in part, and along with available software, indexes, and documentation) public information maintained in electronic formats."[27]

With regard to user fees, OTA has previously concluded that fees in excess of the cost of dissemination could discourage use and create serious inequities in public access. Fees set to recover the full cost of collecting or creating and processing information would be prohibitive to many users. OTA and others have suggested that fees be limited to no more than the cost of dissemination, although there is still disagreement over how this would be determined. H.R.3695 would prohibit agencies from "establishing user fees for public information products that exceed the marginal cost of dissemination" and authorizes agencies to "reduce or waive any user fees for disseminating public information when the agency determines that the dissemination may enhance an agency mission."[28] The definition of "marginal cost of dissemination" is still ambiguous (e.g., true marginal cost, average cost per product, average product line cost), as is the scope of this provision (just information products?; why not information services too?). S.1742 or accompanying report language could address this topic.

The question of licensing agreements is also unsettled. S.1742 does not directly cover this subject. In contrast, H.R.3695 explicitly prohibits agencies, except where specifically provided for by statute, from:[29]

o "establishing an exclusive, restricted, or other distribution arrangement that interferes with timely or equal availability of public information to the public;"

o "restricting or regulating the use, resale, or redissemination of public information products or services by the public;" or

o "charging fees or royalties for resale or redissemination of public information."

Several agencies currently use licensing agreements for purposes of cost recovery and data integrity, and it is unclear whether H.R.3695 would take precedent over other applicable statutes. Two cases in point are the National Technical Information Service (NTIS) and National Library of Medicine (NLM). Both NTIS and NLM get significant revenue from licensing agreements to recover dissemination costs and offset the need for appropriations. A fundamental policy question is whether the benefits of licensing agreements can be realized without adversely affecting the availability of agency information. H.R.3695 proposes that agencies would have to have statutory authority for most if not all licensing agreements currently in use. Licensing agreements typically include some restrictions or limitations on, and fees or royalties for, use or reuse of the information, even if the intent is only to recover costs and/or protect the quality of data and documents. S.1742 or accompanying report language could address this matter.

Sixth, S.1742 does not fully address the responsibilities of the mission agencies to advise the governmentwide dissemination agencies of their information products and services. OTA has suggested in earlier studies that the mission agencies advise both the Superintendent of Documents (SupDocs) and NTIS in advance of any significant dissemination action, so that SupDocs and NTIS would have the opportunity to decide whether and how to participate.[30] H.R.3695 would require that agencies provide advance notice to SupDocs (and to the public, via the Federal Register and other means) of "any action to initiate, terminate, or significantly modify a public information product or service."[31] This, like other provisions of H.R.3695, would apply "to all significant public information products and services, regardless of the form in which public information is disseminated" (emphasis added).[32] S.1742 could require advance notice to SupDocs and NTIS, in addition to the general public notice already proposed, and could define, at least in report language, what is meant by "significant."

Other Federal Agency Responsibilities. S.1742 would require that each agency designate a "Chief Information Resource Management Official."[33] Heretofore, senior agency IRM officials typically have many other responsibilities in addition to IRM. S.1742 would help ensure that some senior agency official would have full-time responsibility for IRM. The range of agency activities specified in the PRA, and elaborated in S.1742, warrants full-time senior leadership in the major Federal departments and agencies. S.1742 makes clear that Chief IRM Officials would be responsible for developing IRM plans, including the deployment of technology and human resources, necessary to implement agency information systems. S.1742 requires that the Chief IRM Officials:[34]

- "develop, implement, and evaluate formalized training programs...on IRM concepts;"
- "enhance the sharing of common data across program and agency lines;"
- "maximize the usefulness and timely release of Government information to all users within and outside the agency;" and
- "periodically evaluate and as needed, improve, the accuracy, completeness, and reliability of data and records contained within Federal information systems."

The need for all of these actions has been identified in earlier OTA studies.

Other OIRA Administrator Responsibilities. Several other OIRA responsiblities assigned under S.1742 comport with findings in prior OTA studies. These responsibilities cover:[35]

- revitalization of the Federal Information Locator System as a means to help the public locate information collected by the government;

- assessment of options to establish a comprehensive inventory of all Federal information dissemination products and services;
- intensified development and enforcement of Federal information processing standards; and
- development and annual updating of a 5-year IRM plan based on the information life cycle.

The OIRA Administrator would be expected to consult with, and be assisted by, the General Services Administration, National Institute of Standards and Technology, and National Archives and Records Administration in carrying out these responsibilities.

Finally, S.1742 would require the Administrator to establish two outside advisory committees--one on information policy and the second on statistical policy. Both committees are to be "broadly representative" and include members from "educational institutions, business, State and local governments, labor, [and] public interest groups."[36] OTA makes extensive use of similar advisory groups, with generally favorable results. If the membership of OIRA advisory groups is balanced with highly qualified individuals of diverse background and perspectives, the contribution to OIRA strategic planning could be significant.

Concluding Comments

Title I of S.1742 is the most comprehensive legislative proposal on Federal information management to be developed since enactment of the PRA in 1980. S.1742 refines, extends, and elaborates on the original congressional guidance in the PRA and its legislative history. In 1980, Congress could only outline the general directions of Federal information management and policy, given the limited experience available at the time and the rather primitive state of information technology.

S.1742 has had the benefit of a decade of experience, trial and error, success and failure, conflict and compromise, with Federal information systems. S.1742 is lengthy and complex, but taken as a whole provides rather complete guidance on OIRA and Federal agency information management responsibilities.

The information management and policy provisions of Title I of S.1742 are consistent with the general thrust of OTA's now decade-long series of studies on directly related topics; we cannot comment in detail on the portions of Title I dealing primarily with paperwork reduction goals, deadlines, and procedures, because we have not conducted studies on these topics. But we note that, as a strategic exercise, paperwork reduction must be viewed as an integral part of Federal information resource management. The government has only scratched the surface of the potential of electronic information technology to reduce paperwork requirements. If the life cycle approach to information management is taken seriously, then improvements in information collection should come just as readily as progress in information processing, storage, and dissemination.

References

1 See U.S. Congress, Office of Technology Assessment, *Informing the Nation: Federal Information Dissemination in an Electronic Age*, OTA-CIT-396 (Washington, DC: U.S. Government Printing Office, Oct. 1988).

2 See, for example, U.S. Congress, Office of Technology Assessment, *Computer-Based National Information Systems: Technology and Public Policy Issues*, OTA-CIT-146 (Washington, DC: U.S. Government Printing Office, Sept. 1981).

3 S.1742, the "Federal Information Resources Management Act of 1989," 101st Congress, 1st Session, Oct. 6, 1989, Sec. 101(3).

4 S.1742, sec. 101(8).

5 OTA, *National Information Systems*, op.cit. and OTA, *Informing the Nation*, op.cit.

6 See OTA, *Informing the Nation*, op.cit.

7 S.1742, sec. 102(6) and (7).

8 See U.S. Congress, Office of Technology Assessment, *Federal Government Information Technology: Management, Security, and Congressional Oversight*, OTA-CIT-297 (Washington, DC: U.S. Government Printing Office, Feb. 1986).

9 See OTA, *Federal Information Management*, op.cit.; OTA, *Informing the Nation*, op.cit.; and U.S. Congress, Office of Technology Assessment, *Federal Scientific and Technical Information in an Electronic Age: Opportunities and Challenges*, Staff Paper, Oct. 1989.

10 S.1742, sec. 103(c).

11 S.1742, sec. 104(a)(3),(4),(6), and (7).

12 See U.S. Congress, Office of Technology Assessment, *Statistical Needs for a Changing U.S. Economy*, OTA-BP-E-58 (Washington, DC: U.S. Government Printing Office, Sept. 1989) and *Technology and the American Economic Transition: Choices for the Future*, OTA-TET-283 (Washington, DC: U.S. Government Printing Office, May 1988).

13 S.1742, sec. 104(c).

14 See U.S. Congress, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and*

Individual Privacy, OTA-CIT-296 (Washington, DC: U.S. Government Printing Office, June 1986).

15 S.1742, sec. 104(d).

16 OTA, Informing the Nation, op.cit. and Scientific and Technical Information, op.cit.; also see U.S. Congress, Office of Technology Assessment, Renewing the U.S. Competitive Edge: The Role of Federal Scientific and Technical Information, scheduled for spring 1990 publication.

17 S.1742, sec. 104(e)(h)(1) and (2).

18 S.1742, sec. 104(e)(h)(3).

19 S.1742, sec. 106(3)(F).

20 See OTA, Informing the Nation, op.cit., Scientific and Technical Information, op.cit., and Renewing the U.S. Competitive Edge, op.cit.

21 See OTA, Informing the Nation, op.cit.

22 H.R.3695, the "Paperwork Reduction and Federal Information Resources Management Act of 1989," 101st Congress, 1st Session, Nov. 17, 1989, sec. 103(c)(h)(2)(B)(ii).

23 H.R.3849, the "Government Printing Office Improvement Act of 1990," 101st Congress, 2d Session, Jan. 23, 1990.

24 See OTA, Informing the Nation, op.cit.

25 See OTA, Informing the Nation, op.cit., Scientific and Technical Information, op.cit., and Renewing the U.S. Competitive Edge, op.cit.

26 Ibid.

27 H.R.3695, sec. 103(c)(h)(2)(B)(i).

28 H.R.3695, sec. 103(c)(h)(2)(C)(i) and (D)(iv).

29 H.R.3695, sec. 103(c)(h)(2)(D)(i),(ii), and (iii).

30 See OTA, Scientific and Technical Information, op.cit., and Renewing the U.S. Competitive Edge, op.cit.

31 H.R.3695, sec. 103(c)(h)(2)(B)(iv)(I) and (II).

32 H.R.3695, sec. 103(c)(h)(1)(B).

33 S.1742, sec. 106(2)(C).

34 S.1742, sec. 106(2)(B)(2)(C), (3)(C)(3)(A) and (B), and (3)(F)(11).

35 S.1742, sec. 108, sec. 109(e)(3, (e)(4), and (f).

36 S.1742, sec. 111(e)(1) and (2).

JOHN D. DINGELL
CHAIRMAN

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

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MICHAEL F. BARRETT, JR.
CHIEF COUNSEL/STAFF DIRECTOR

NEWS RELEASE

February 6, 1990

Contact: Dennis Fitzgibbons
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DINGELL CRITICIZES DELAY IN HAZARDOUS WASTE RULES

Congressman John D. Dingell (D-MI), Chairman of the House Energy and Commerce Committee and its Oversight and Investigations Subcommittee, had the following comment today on the issuance of the Superfund National Contingency Plan:

"One of the sad environmental legacies of the Reagan Administration was its failure to propose a plan for implementing the 1986 Superfund Amendments until December of 1988. Thanks to their delay, the final rule is only now being issued, 3 1/2 years after the passage of the 1986 law.

"These regulations are long overdue. But the new Administration has not even proposed an equally important hazardous waste regulation more than one year after taking office. Under the 1984 Amendments to the Resource Conservation and Recovery Act, a 'corrective action regulation' is needed to set the rules for cleaning up hazardous waste contamination at sites not covered by Superfund. The Office of Management and Budget has delayed and tried to substantially weaken the rule for more than a year, hamstringing cleanup efforts."

[A letter from Congressman Dingell to EPA Administrator Reilly concerning delays in the regulation is attached.]

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ONE HUNDRED FIRST CONGRESS

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U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

January 24, 1990

The Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Dear Mr. Reilly:

During proceedings for your confirmation as Administrator of the Environmental Protection Agency, the Senate Committee on Environment and Public Works raised serious concern about interference by the Office of Management and Budget (OMB) with the EPA's publication of its proposed corrective action rule. On February 1, 1989, you responded to the Senate Committee as follows:

> The proposed rule for corrective action at Solid Waste Management Units has been undergoing review by the Office of Management and Budget since October 7, 1988. I understand that the Agency is working closely with OMB to answer the few remaining concerns. If OMB has not completed its review by the time I am sworn in as Administrator, I can assure you that I will take the necessary steps to quickly resolve the remaining issues and have the rule published promptly.

Now, more than one year since the submission of the corrective action rule to OMB, the rule remains caught in the OMB logjam. This delay is particularly troubling because the corrective action rule is one of the most significant hazardous waste regulations required under the Resource Conservation and Recovery Act (RCRA). Moreover, as I emphasized to you in my letter of April 12, 1989, "delay in the publication of this rule is adversely affecting this crucial RCRA program." A July 31, 1989 letter to OMB from your own Deputy, Henry Habicht, reiterates similar concerns.

In view of the importance of the corrective action rule, the Subcommittee requests a detailed explanation for the extensive delays in this rulemaking and the current timetable for final action. In addition, the Subcommittee requests the following information in order to fulfill our continuing oversight responsibilities under Rules X and XI of the Rules of the U.S. House of Representatives:

1. copies of all written documents exchanged between EPA and OMB officials relating to the draft proposed rule since August 1, 1989;
2. copies of all documents, including but not limited to, notes, agendas, and activity reports, which relate to meetings, discussions, or telephone calls between EPA and OMB officials since August 1, 1989, concerning the draft proposed rule;
3. copies of all Agency documents, including but not limited to, briefing papers, agendas, or memoranda, relating to staff briefings of EPA officials since August 1, 1988, concerning OMB's review of the draft proposed rule; and
4. a list of all meetings, discussions, and telephone conversations between EPA and OMB officials since August 1, 1989, concerning the draft proposed rule, including the names and titles of all officials involved in such oral communications, the date of such communications, and the issues discussed.

Please provide the requested information no later than the close of business on Wednesday, February 14, 1990. If you have any questions concerning this request, please contact Subcommittee Counsel Debra Jacobson at 225-4441. Thank you for your cooperation.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

JDD:DJcm

cc: The Honorable Thomas J. Bliley, Jr.
Ranking Minority Member
Subcommittee on Oversight and Investigations

The Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation and Hazardous Materials

The Honorable Norman F. Lent
Ranking Minority Member
Committee on Energy and Commerce

The Honorable Quentin N. Burdick
Chairman
Senate Committee on Environment and Public Works

The Honorable Max Baucus
Chairman
Subcommittee on Environmental Protection
Senate Committee on Environment and Public Works

The Honorable John H. Chafee
Ranking Minority Member
Subcommittee on Environmental Protection
Senate Committee on Environment and Public Works

Viewpoint: What I will tell the next administration about information resources management in the federal government

Francis A. McDonough

After the election of a new president, government executives have two opportunities to propose agenda items to the new administration—working with the transition team and working with the new political appointees. Here is what one senior GSA official will tell the new administration about the present and future of federal information resources management.

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1988 was a presidential election year. Big changes have begun and many more are ahead. So what else is new? Every year is a year of change for those involved in federal information management. The question is how can each employee help in the development of the new eight-year agenda for the federal information management community?

OPPORTUNITIES TO INFLUENCE CHANGE

The four months following the election of a new president offer senior career executives two opportunities to propose new agenda items to political appointees. The first opportunity occurs with the arrival of the transition team. These teams, one in each of the larger agencies, are generally composed of the people who helped to get the new president elected. They review the programs in agencies, assess the senior career staff, and develop early versions of action plans for each agency.

The second opportunity to influence change occurs with the arrival of the new federal appointees in the top jobs in government. There is only a narrow window to influence these officials. In the larger agencies these officials come on board between January and April, and they set their agenda within 45 days. After this period, the opportunity to help the new administration set its goals is lost.

Suppose as a federal employee you receive a call in early December, only four weeks after the election. The transition team wants you to brief them on the information management program for your agency. They want you to discuss where the program is, what the problems are, what the goals are, and how these goals are going to be achieved. Finally, they want you to do it in ten minutes because they are running late for other appointments.

It is hard to believe that eight years have passed since the election of the last president. In 1980, there

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In 1980, there was one clear message for the transition team and for the new political appointees: Too many of the government's computers were obsolete, and a modernization program was needed.

was one clear message for the transition team and for the new political appointees: Too many of the government's computers were obsolete, and a modernization program was needed. Today there is a different message. In fact, there is a series of important messages federal information management employees should try to get across in the ten minutes with the transition team and later with the new officials when they are appointed.

THE FEDERAL GOVERNMENT HAS HAD A SUCCESSFUL PROGRAM TO MODERNIZE ITS COMPUTERS AND APPLICATION SYSTEMS

In the 1950s and 1960s, the federal government was the acknowledged leader in the development and application of information technology. By the 1970s, policy officials had begun to overcontrol the acquisition process. There were too many sole-source acquisitions, called "interim upgrades." Agencies indicated they needed authority to conduct a sole-source procurement to solve an immediate operational problem. These agencies always promised that a competitive acquisition would follow, but it rarely did. Agencies' unwillingness to seek the full benefits of competitive acquisition and the General Services Administration's (GSA) attempts to solve the problem through more intensive reviews created widespread obsolescence problems.

When many systems critical to the nation ran on obsolete equipment, the information management community was vulnerable to criticism by political appointees. How many employees have heard statements like "Let's get some up-to-date contractors in here to tell us how to solve our problems."? Obsolescence made us a little timid and took away some of our self-confidence. Sometimes employees were reluctant to speak up even though they knew they were working on the most advanced, complex, and most difficult systems in the world. Sometimes even we began to believe that we were a little dusty, a little rusty, and were second class citizens in comparison to the "more modern" private sector.

By 1980, everyone realized something had to be done to solve the obsolescence problem. GSA took the lead and streamlined the acquisition process. Procurement authority was delegated more rapidly to the single designated official in each agency. Less paperwork was required. Networks of policy officials were reinvigorated to share lessons learned. GSA developed the Procurement Management Review Program, which led to different levels of procurement authority. Agencies that were well managed were given high levels of authority; those with management problems were given lower levels of authority.

In the mid-1980s, GSA and four major agencies (the Departments of Agriculture, Health and Human Services and Navy and the National Aeronautics and Space Administration) developed the Go-for-12 Program to identify ways to speed up the acquisition process. This led to the "Trail Boss" program to professionalize the job of the major acquisitions manager.

Throughout this period, the Office of Management and Budget (OMB) endorsed efforts to modernize the government's systems; agencies, too, have been very supportive to GSA in many ways. The administration has also supported the modernization goal and has nearly doubled the information technology budget in the past six years.

Now, in 1988, obsolescence has largely been solved. Today, if obsolescence exists in an important system, it is often due to competing influences within an agency.

CAREFULLY THOUGHT-OUT POLICIES FOR INTRODUCING MICROCOMPUTERS INTO THE GOVERNMENT WERE DEVELOPED IN 1982

The second message to the transition team should be that the government has been building a base of resources and skills through the Managed Innovation Program. A goal was set six years ago to bring 1 million microcomputers into the government between 1983 and 1991. The objective has been to develop the federal workforce so that it will be able to restructure work quickly when the technology improves dramatically in the early 1990s. Several microcomputer manufacturers and market forecasters have told me that the federal government is the world leader in its use of this technology and in terms of the demands it places on the manufacturing sector (pers. comm. 1987–1988).

PROGRESS HAS BEEN MADE IN MANAGEMENT ISSUES

The third message should be that with obsolescence largely out of the way, federal managers have been able to look at the long-term needs of the federal information community. OMB, GSA, and the President's Council on Management Improvement (PCMI), building on legislation from the House Committee on Government Operations, have started several important initiatives that need to be continued.

- There has been a new emphasis on translating capital investment into service to the citizens. A lot has been done. For example, in 1980 it took
  - 6–8 weeks to get a social security card. Today it takes 10 days.
  - 43 days to get a passport. Today it takes 10 days.
  - 75 days to get an export license. Today it takes 16 days, and only 5 days for "most trusted countries."
  - over 100 days to process a claim for a Department of Housing and Urban Development Title I loan. Now it takes 22 days.
- There has been a major emphasis on developing common administrative systems to be used by all agencies. The objective is to reduce the hundreds of accounting, payroll, personnel, and budget systems to two or three in each category. Fewer systems will save a great deal of money and will provide better governmentwide management information.
- There has been a major emphasis on streamlining the processes by which major systems are acquired. The Federal Acquisition Procurement Regulations have been reduced by 50 percent. The "Go-for-12" program has demonstrated that reducing roadblocks and streamlining the processes can reduce the time needed to acquire major systems from 36 to 18 months.
- There has been a major emphasis on identifying those systems that are critical to the nation and ensuring that the highest management attention is given to them. At the moment, 15 systems are in the critical system category, and a budget commitment of $14 billion is planned over the life of these presidential priority systems. They include Airspace Automation, Tax System Redesign, and the new governmentwide telecommunications system called FTS 2000.
- Finally, there is recognition of the need to develop people with the experience to acquire and implement major information systems. The "Trail Boss" program addresses this need and is in the process of developing 300 experts in the government to manage major information systems acquisitions.

THE FEDERAL INFORMATION MANAGEMENT COMMUNITY—A NATIONAL RESOURCE

The fourth message should be that there are people in the government with great expertise in big and small computers, local and long-distance telecommunications, software, and the management of information itself. Of equal importance, these people understand the needs of their organizations, they know how to work the half-million systems that run the government, and they know how to get things done in the government.

Private sector people do not often work on systems that have the scale and complexity of federal systems. If the chief information officer or the vice president of information in a New York City bank does something, he or she is doing something that thousands of other banking officials are doing. In the federal government, when the Patent and Trademark Office, the Internal Revenue Service, the Federal Aviation Administration, or Lawrence Livermore Laboratory does a job, there is no model. Frequently, no one else does the kinds of jobs that the government does with information technology. There is no one to copy. The government is often on its own, breaking new ground, when it undertakes new systems. Clearly, government information systems managers work on the biggest, most complex, and most unique system problems.

The Go-for-12 Program and the author's numerous discussions with federal managers suggest that at least 12 years in the information business and 5 years in the government are required before one has the experience and personal credibility to undertake major system acquisitions and implementations in the government. In many cases, contract personnel from industry are needed and successfully used. Personnel from many companies help to study problems, and they help to implement the programs after they are conceptualized. However, industry, performing in a service role to the government, must be managed by federal executives. Major problems can occur if management responsibilities are abdicated and turned over to private sector contractors.

The future of federal information systems lies with experienced in-house career employees who know the mission and the technology and who have the experience and personal credibility to conceive and manage new major systems. There are several hundreds of these people in government agencies. They comprise an important federal resource. They stand at the pinnacle of achievement in the world of information systems management.

The future of federal information systems lies with experienced in-house career employees who know the mission and the technology and who have the experience and personal credibility to conceive and manage new major systems.

THE WORLD LEARNS FROM WASHINGTON

In the years 1100 to 1750, when Venetians were acknowledged as the foremost traders, the leaders of other countries and their ships and their goods found their way to Venice. Today, we in the federal government, and especially in Washington, D.C., are like the Venetians of long ago. We are world leaders in large, complex systems and the use of technology. Information of all kinds comes to the federal government in a flood. Reports, newspapers, journals, books, conferences, discussion groups, training of all sorts, information, and ideas of all kinds in all forms are available to us whether we seek them or not. Public and private speakers at very high levels are pleased to be invited to speak at federal conferences to discuss their programs and their insights.

As an example, John Sculley of Apple Computer and former Chairman of Pepsico was probably the highlight of the 1987 conference year. Vittorio Cassani of AT&T; William G. McGowan, Chairman of MCI; and James E. Olson, the late chairman of AT&T, are other examples of the many who have come to the government to share their views and experiences with federal managers and seek insights.

Over the years information executives from many countries—for example, Russia, Japan, Germany, Korea, Austria, and France—have visited Washington. Generally, executives from all countries are interested in the same issues that concern U.S. executives: personnel, reduced budgets, implementing end-user computing, centralized versus decentralized authority, and managing information instead of technology. Frequently, however, foreign executives say that the U.S. government is several years ahead of their government. German government officials have admired the progress the United States is making with end-user computing. Some countries, including Austria, have been interested in the progress the United States is making with the concept of information resources management, and they are considering seeking legislation like the Paperwork Reduction Act of 1980.[1] Bolivia has been interested in the way the United States uses multiple award schedules to speed up and systematize the award of small contracts.

A FINAL MESSAGE ON THE CURRENT STATE OF AFFAIRS

When members of the transition team are briefed, they should be told that they will not believe the scale of their work in the federal information management sector. The federal government has perhaps 3 percent to 4 percent of all of the computer and telecommunications resources in the world. Many of the uses are at the leading edge of technology. Hundred-million-dollar proposals for new or upgraded systems are routine.

I will say to the new officials: You will be called on to make decisions on systems that you will not understand unless you study them full time for one year, and you will not be able to do this and you will have to make decisions anyway. Also, the entire process of acquiring new resources has become very legalistic. Protests, lawsuits, depositions, and courtroom hearings have become a routine part of federal information management. Yet, while you are in it, you will be invigorated by it all. And you will know you are working in the major leagues of information systems. My final words will be, "Like all who have been in the majors, you will find it hard to play in any other league again."

THE NEW AGENDA

What about the next eight years? Sure, a lot of good work has been done in modernization. Agreed, wonderful bases of microcomputer technology and workforce knowledge are being built. Certainly, some of the more difficult management problems, like common administrative systems, have begun to be addressed.

The new team that takes over in January 1989 will want to make its own mark and put its own stamp on some things. Recognizing this, the focus during the next eight years should be on service for the citizens. OMB and PCMI have done some work in this area in recent years. A great deal more can and will be done in the next eight years.

The good news is that a solid base exists on which to begin a new government program emphasizing service for the citizens. Today initiatives can be planned that would have been inconceivable eight years ago.

One early example of service for the citizens is a recent effort by the Social Security Administration (SSA). Under this program, citizens can call an 800 number to learn the status of their social security benefits. The program proved far more popular than SSA had anticipated: Insufficient phone lines had been provided to handle the flood of callers.

> *A solid base exists on which to begin a new government program emphasizing service for the citizens. Today initiatives can be planned that would have been inconceivable eight years ago.*

The early problems with this new service should not detract from the major message provided by this experiment. The citizens want, need, and will respond to better and more imaginative service by their federal government. It is easy to think of more imaginative service to Veterans, federal loan applicants, farmers, students, the sick—all of the many categories in which citizens may find themselves during different phases of their lives.

Big things take big time. In each case, it will take time to plan improved service to the citizens, to acquire resources, and to implement the solutions. Here, at the beginning of a new administration, there is a great opportunity to set in place initiatives that can materialize during the next eight years.

If service for the citizens begins to be the focus, does this mean that modernization, common administrative systems, and the Managed Innovation Program that is building a base of microcomputer technology and knowledge can be forgotten? Certainly not! Achieving modernization in the government is not a one-time objective that will be completed in the 1980s. It is an ongoing, continuing objective, and it is needed to permit higher level goals such as service for the citizens.

The accomplishments of the 1980s are like the rocket engines that permit humans to go into outer space to perform other experiments and tasks. The base that has been built in the 1980s will permit the federal government to begin a program of greater service for the citizens. But, as it is undertaken, it is necessary to ensure that the processes for acquiring and using technology are streamlined and that the equipment, software, and people resources remain current and modern. In other words, the government will have to keep doing all of the things it has been doing during the 1980s as it begins to focus on higher level goals to provide better service for the citizens.

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The U.S. government is out in front again, as it was in the 1950s, 1960s, and early 1970s. We will have a different message to give to the incoming president and his team than we did in 1981. Thanks to the work of many people on Capitol Hill—career and political appointees, and contractors—we are in a strong position to help make a difference in government service to the country. Right now, federal information managers need to do a few things. The first is to be sure we do not slip back down as we did in the 1970s. The second is to tell the new bosses that the United States government is the world leader in the use of information technology. No one, in Japan, in Europe, or in the private sector in the United States does what the U.S. government does in terms of complexity and size and placing new demands on the technology. The third is to take advantage of the major capital investments made in recent years. We have been given the resources; we must continue to demonstrate that we know how to use them to produce a more effective service-oriented government.

We know how to do it. Let's stay out in front!

REFERENCE

1. PL 96-511, 44 U.S.C.

Presidential Management of Agency Rulemaking

Harold H. Bruff*

This Article examines legal and policy issues surrounding presidential management of agency rulemaking. Its premise is that there has been sufficient experience with this activity to justify a general appraisal. Therefore, I examine the record of the Reagan administration's program, which is easily the most ambitious to date. Prominent controversies under that program are summarized here. The effort is not to provide a definitive administrative history, but to identify issues likely to arise in the future. My general conclusion is that a presidential oversight program has its place in the administrative state, but that certain controls on its exercise need to be adopted to keep it within appropriate bounds of law and policy.

Part I begins by outlining the constitutional framework within which oversight operates. Part II examines the comparative abilities of the President and Congress to manage regulation, and concludes that there is a need for a limited executive role. Part III describes the evolution of presidential management programs from the early 1970s to date. Part IV assesses the comparative competence of the Office of Management and Budget and the agencies with regard to regulatory issues as well as the relative power of these institutions. In Part V, I examine a number of controversies over the current program's fidelity to statutory authority. Part VI addresses the openness of executive oversight, and makes recommendations on an appropriate degree of disclosure. Finally, in Part VII I seek criteria for identifying rulemaking functions that should be excepted from oversight.

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I. *The Constitutionality of Executive Oversight*

The Constitution does not foreshadow the rise of the modern "administrative state" that regulates so many aspects of our lives. Instead, the federal bureaucracy is almost wholly statutory in origin and organization, and therefore occupies an uneasy constitutional status.[1] The provisions of the original Constitution that delineate the interrelations of the three great branches of government are skeletal—even cryptic—in nature.[2] Perhaps because of the flexibility engendered by this characteristic, they have survived almost unchanged despite the vast changes that two centuries have wrought in the nation.[3] Obviously, an accommodation of present practice to ancient text has been requisite. It exists in the form of a considerable body of constitutional doctrine and administrative law that provides legitimacy for modern institutions and guidance about their operations.[4]

Questions about the President's power to supervise administration in competition with Congress have always invited arguments of Hamiltonian sweep or Jeffersonian caution.[5] A brief review of the

pertinent text and the major interpretive positions will outline this unresolved debate. Article II vests the "executive Power" in the President.[6] At the least, this provision signifies that the Framers rejected proposals for a plural, divided executive.[7] Perhaps it means no more than that, but presidential partisans have always read it as a substantive grant of "executive" power, whatever that is.[8] Similarly, the President's duty to "take Care that the Laws be faithfully executed"[9] may mean only that he must enforce particular statutory powers that Congress gives him,[10] or that he derives a broader power to reconcile the body of legislation as a whole.[11] Finally, the President has explicit power to require the "Opinion, in writing" of department heads regarding their duties.[12] This clause, obscure of intent, grants the President at least some power to consult with his bureaucratic chiefs.[13] Its presence in the Constitution, however, suggests that the Framers held a view of the presidency that is difficult to reconcile with expansive views of the office.[14]

Congress can respond to claims of broad presidential power by citing its Article I powers to legislate and its related authorization in the "necessary and proper" clause to pass laws effectuating powers vested in the other branches.[15] Today, it is generally accepted that the President is not free to contravene congressional policies embodied in statutes, at least in domestic contexts such as regulation.[16] This principle of congressional supremacy does not, however, tell us how to resolve disputes over power in the interstices between clear statutory commands.

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[1] *See generally A Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987).

[2] *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597-601 (1984).

[3] Five amendments have affected presidential elections, succession, and disability. U.S. CONST. amend. XII (affecting the procedures governing presidential elections); U.S. CONST. amend. XX (providing succession procedures for the President); U.S. CONST. amend. XXII (establishing the maximum period one can hold the presidential office); U.S. CONST. amend. XXV (establishing the procedures for presidential disability). *See also* U.S. CONST. amend. XVII (providing for the direct election of senators).

[4] *See* Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 166-70; Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 451-55 (1979).

[5] Classic arguments of this kind arose in 1793 concerning Washington's proposed Neutrality Proclamation. *See* J. ROCHE & L. LEVY, THE PRESIDENCY 10-12 (1964). Hamilton argued that the Proclamation was authorized by a grant of power in Article II:

> The second article of the constitution of the United States, section first, establishes this general proposition, "the EXECUTIVE POWER shall be vested in a president of the United States of America.
>
> The same article, in a succeeding section, proceeds to delineate particular cases of executive power. . . . It would not consist with the rules of sound construction, to consider this enumeration of particular authorities, as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations. . . . The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable, that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. . . . The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power. . . .

Id. at 10-11.

James Madison responded with the Jeffersonian position:

> The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must pre-suppose the existence of the laws to be executed. A treaty is not an execution of the laws; it does not pre-suppose the existence of laws. . . . To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory this is an absurdity . . . in practice a tyranny. . . .
>
> Another important inference to be noted is, that the powers of making war and treaty being substantially of a legislative, not an executive nature, the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on those subjects. . . .

Id. at 11-12.

[6] U.S. CONST. art. II, § 1.

[7] *See* Strauss, *supra* note 2, at 599-601.

[8] For a more modern statement of the Hamiltonian position, see Myers v. United States, 272 U.S. 52, 118 (1926).

[9] U.S. CONST. art. II, § 3.

[10] *Myers*, 272 U.S. at 177 (Holmes, J., dissenting) (stating that "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power").

[11] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting). Chief Justice Vinson noted that "[u]nlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed." *Id.*

[12] U.S. CONST. art. II, § 2, cl. 1.

[13] *See* Strauss, *supra* note 2, at 646-48.

[14] Justice McReynolds stated:

> It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable power here claimed.

Myers, 272 U.S. at 207 (McReynolds, J., dissenting).

In these situations presidents use executive orders to implement their directives to the bureaucracy, relying on any combination of constitutional and statutory authority that is thought to be available.[17] Thus, these orders often dwell in a zone of twilight, where authority is neither clearly present nor absent.[18] Although interstitial, the programs involved may prove surprisingly durable. Two prominent examples are orders promoting civil rights in government-related activities and orders seeking economic stabilization.[19]

The principle of congressional supremacy also does not tell us how to approach statutes that directly address the power of the constitutional branches. For these separation of powers controversies, the courts employ varying analytic approaches. There are two main competitors, with contrasting implications for the outcome. The Court has often used a formalistic approach that reasons logically from the constitutional text and the Framers' acknowledged purpose to create three independent branches with distinct functions. These cases tend to draw bright lines between the responsibilities of the branches. In recent years, three landmark formalist decisions have produced victories for the executive. In *Buckley v. Valeo*,[20] the Court refused to allow Congress to appoint executive officers. In *INS v. Chadha*,[21] the Court invalidated the legislative veto, by which Congress had sought to override executive action by means less formal than legislation. And in *Bowsher v. Synar*,[22] the Court forbade an officer removable by Congress to perform executive functions.

The competing approach is a functional one that assesses the needs of each branch for protection of its "core" constitutional functions. These cases stress the Framers' inclusion of checks and balances, shared powers that aid the overall strategy of controlling each branch and ultimately the government as a whole. Examples include *United States v. Nixon*,[23] recognizing a limited executive privilege, and *Nixon v. Adminstrator of General Services*,[24] upholding congressional authority to regulate presidential papers. Functional analysis favors complex arrangements blending the powers of the branches; formalism tends to condemn them.

The Supreme Court has explained that formalism is appropriate for cases presenting a threat that one branch will aggrandize itself at the expense of another.[25] There, "good fences make good neighbors." When the Court perceives no sign of aggrandizement, it employs the looser, functional approach.[26] Thus, in *Morrison v. Olson*,[27] the Court upheld provisions of the Ethics in Government Act[28] that provide for court-appointed independent counsel to investigate and prosecute high-level executive branch officials who are accused of serious federal crimes.

The *Morrison* Court upheld a statutory provision allowing removal of independent counsel for "good cause," rejecting arguments that everyone performing executive functions, or at least all prosecutors, must be removable at the will of the President to protect his responsibilities under Article II.[29] The Court then worked an explicit change in the law that will spark widespread argument and speculation about *Morrison's* significance. *Buckley*, *Chadha*, and *Bowsher* had left many observers questioning the continued vitality of *Humphrey's*

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[15] *See generally* Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788 (1975).

[16] The Supreme Court held early on that executive officers must obey statutory directives. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 612-14 (1838). That proposition is no longer in doubt, absent a challenge by the executive to the constitutionality of the statute. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (holding that the President's seizure of steel mills was illegal because it was forbidden by statute).

[17] *See generally* Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L L. 695, 710-12 (1976) (reviewing the President's power to issue rule-like statements); Kennan, Executive Orders: A Brief History of Their Use and the President's Power to Issue Them, *reprinted in* SENATE SPECIAL COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., 2D SESS., EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 20 (Comm. Print 1974); Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105 (1964) (examining the executive order and its use by the President). For a compilation of many important executive orders, see OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMIN., CODIFICATION OF PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS: JANUARY 20, 1961—JANUARY 20, 1985 (1985).

[18] *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-40 (1952) (Jackson, J., concurring) (explaining the various situations in which a President may act).

[19] *See* Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1 (1976); AFL-CIO v. Kahn, 618 F.2d 784, 789-96 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979).

[20] 424 U.S. 1 (1976).

[21] 462 U.S. 919 (1983).

[22] 478 U.S. 714 (1986); *see* Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779. *See generally Symposium*, Bowsher v. Synar, 72 CORNELL L. REV. 421 (1987).

[23] 418 U.S. 683 (1974).

[24] 433 U.S. 425 (1977).

[25] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986). The Court stated that "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch." *Id.*

[26] *See* Mistretta v. United States, 109 S. Ct. 647, 659-60 (1989) (upholding functions of the U.S. Sentencing Commission against a separation of powers challenge).

[27] 108 S. Ct. 2597 (1988).

[28] 28 U.S.C.A. §§ 49, 591-99 (West 1973 & Supp. 1988).

[29] *Morrison*, 108 S. Ct. at 2608-11, 2622.

Executor v. United States.[30] That case upheld a "good cause" provision restricting the removal of Federal Trade Commissioners and, in dicta, gave independent agencies such as the FTC broad immunity from presidential supervision. *Humphrey's Executor* said, however, that the President could remove "purely executive" officers (whoever they are) at will.[31]

This portion of the opinion squelched recent Justice Department arguments that independent agencies cannot constitutionally operate free of plenary presidential removal power.[32] Still, the Court called for an ad hoc inquiry into the relationship between a particular function and presidential supervisory needs. Moreover, the Court stressed that the independent counsel is not a policymaker in the broad sense, in contrast to agencies like the FTC and the Federal Reserve Board.[33] Some independent functions may fall prey to the new balancing test.

It would be a mistake, however, to read *Morrison* as a case that settles much beyond its context. The Court's formalist opinions, drawing bright lines between the branches, promote political accountability by clarifying the responsibility of executive officers for the choices they make in administering statutes.[34] When accountability cannot be expected to produce sound decisions, as in the situations covered by the Ethics in Government Act, it should be permissible to qualify executive authority.[35] Thus, *Morrison* appropriately endorsed congressional power to remedy special problems

in prosecuting senior executives. It is not a broad warrant for shearing the President of control over other executive functions.

Although uncertainty still surrounds the constitutional status of the agencies and their amenability to presidential supervision, some generalizations can be ventured. Under the "Opinions" Clause,[36] a President may require executive officers to report their views on any policy issues that the President deems important. In return, the President may communicate his own policy views, or those of his chosen subordinates, to agencies and may expect these views to be honored within the limits of discretion conferred by statute. In case of disagreement, however, the President may not simply render a decision himself when Congress has vested such authority in another officer.[37] Instead, the President's remedy is to remove the officer, within statutory limits on that power, in hopes of finding a more compatible replacement.[38]

These principles reveal an enduring tension between presidential supervision of execution and congressional supremacy over legislation.[39] They provide only a framework for addressing, and not a formula for answering, the hard questions that attend the actual administration of government. For example, what if presidential oversight is faithful to the letter of statutes, but appears to violate their spirit? On the other hand, should restrictions on removal of officers be read to forbid kinds of oversight that otherwise would be permissible? I address these and other issues below. In doing so, I begin with the premise that each of the two branches has a serious claim to the oversight of administration, and that accommodation should be sought wherever possible.[40]

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[30] 295 U.S. 602 (1935).

[31] *Id.* at 610. In Myers v. United States, 272 U.S. 52 (1926), the Court held that Congress could not condition presidential removal of an officer on the Senate's advice and consent. The Court would not allow Congress to expand the Senate's role beyond its explicit authorization to review appointments. The Court's formalist rationale was that no branch should have implied powers to participate in functions constitutionally assigned to another; because removal was an executive function, the Senate could not share it. The Court concluded that Article II granted the President an illimitable power to remove those executive officials whom he had appointed. *Humphrey's Executor* limited the application of *Myers* to "purely executive" officers.

[32] *See, e.g.*, *Bowsher*, 478 U.S. at 760-61 (White J., dissenting).

[33] *Morrison*, 108 S. Ct. at 2619.

[34] *See* Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 503-06 (1987). In *Sierra Club*, the D.C. Circuit stated that it recognized

> the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the Executive Branch, the Constitution—and its judicial gloss—vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy.

657 F.2d at 405 (footnotes omitted).

[35] *See* Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 548-49 (1988).

[36] U.S. CONST. art. II, § 2, cl. 1.

[37] The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823).

[38] The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 489 (1831).

[39] In Myers v. United States, 272 U.S. 52 (1926), Chief Justice Taft captured these tensions in a single pregnant passage:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

Id. at 135.

II. *The Need for Executive Management of Rulemaking*

Any appraisal of regulatory oversight must address two broad questions at the outset. First, what goals should oversight try to achieve? Second, which branches of government are suited to pursue each goal? Answering these questions separately helps to clarify issues of technique. For example, we should not belabor a branch for failing to achieve something that is beyond the present capacities of government generally.

The broadest possible role for oversight is "macromanagement," coordinating national policy on the grand scale. That is a highly complex task, and a central responsibility of government. Nevertheless, there are limits to the amount of coordination that any government can perform. The information necessary to make coherent centralized decisions about society as a whole simply does not exist, as the Soviets so consistently demonstrate.[41] Instead, we must seek "second best" levels of coordination that are geared to actually available knowledge.

A more limited goal is "micromanagement," which addresses regulation on a case-by-case basis. This kind of oversight can strive to conform individual rules to a set of general principles, such as economic efficiency or distributional equity. More modestly, it can remain within the compass set by the regulator, and ask only such questions as whether the rationale for the rule is sensible and whether factual support is present.

A vigorous call for macromanagement of rulemaking was made by the American Bar Association's Commission on Law and the Economy, to improve policy coordination and to avoid unnecessary cost, duplication, and conflict:

> Our government has adopted a wide variety of national goals. Many of these goals—checking inflation, spurring economic growth, reducing unemployment, protecting our national security, assuring equal opportunity, increasing social security, cleaning up the environment, improving energy sufficiency—conflict with one another, and all of them compete for the same resources. One of the central tasks of modern democratic government is to

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[40] There is much wisdom in Professor Freund's observation that "[i]n the eighteenth-century Newtonian universe that is the Constitution, an excessive force in one direction is apt to produce a corresponding counterforce." Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 20 (1974).

[41] *See, e.g.*, T. SOWELL, KNOWLEDGE AND DECISIONS 41-42 (1980) (emphasizing the advantages of decentralized markets in allocating resources efficiently due to the difficulty of assembling the same information centrally).

> make wise balancing choices among courses of action that pursue one or more of these conflicting and competing objectives.
>
> While Congress establishes the goals, it cannot legislate the details of every action taken in pursuit of each goal, or make the balancing choices that each such decision requires. It has therefore delegated this task to the regulatory agencies. But it has given each of the regulatory agencies one set of primary goals, with only limited responsibility for balancing a proposed action in pursuit of the agency's own goals against adverse impacts on the pursuit of other goals. For most of these agencies, no effective mechanisms exist for coordinating the decisions of one agency with those of other agencies, or conforming them to the balancing judgments of elected generalists, such as the President and Congress. Appointed rather than elected, specialist rather than generalist, regulatory agency officials enjoy an independence from the political process—and from one another—that weakens the national ability to make balancing choices, or to hold anyone politically accountable when choices are made badly or not at all.[42]

To illustrate the problem, the Commission noted that, as of 1979, at least sixteen federal agencies bore regulatory responsibilities that directly affected the price and supply of energy.[43] This diffusion of policymaking authority had persisted despite the earlier consolidation of several energy-oriented agencies into a Department of Energy. Similar multiplicity problems presented themselves with respect to antitrust, equal employment, industrial safety, and natural resources policymaking. From this, the Commission concluded:

> Congress cannot perform these [balancing] tasks by legislating the details of one regulation after another; that is why Congress delegated rulemaking power to the agencies in the first place, and gave them a wide degree of discretion as to the content of the rules to be issued. The President is the elected official most capable of making the needed balancing decisions as critical issues arise, while the most appropriate and effective role for Congress is to review and, where necessary, to curb unwise presidential intervention.[44]

The Commission did not clearly separate the question of the extent of feasible policy coordination by our government from the question of comparative institutional capacities to perform it. Perhaps for that reason, there is a considerable gap between the broad scope of the macromanagement problem the Commission perceived and its recommendations, which tended toward micromanagement.[45]

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[42] COMMISSION ON LAW AND THE ECONOMY, ABA, FEDERAL REGULATION: ROADS TO REFORM 68 (1979) [hereinafter ROADS TO REFORM].

[43] *Id.* at 70.

[44] *Id.* at 73 (footnote omitted).

[45] The Commission recommended interagency review of regulatory analyses

Most questions of macromanagement of regulatory policy can be settled only by Congress, through legislation, and even then quite imperfectly.[46] For example, such tasks as the consolidation of scattered functions into the Department of Energy require legislation, but do not eliminate problems of coordinating policy.[47] The executive can play a role, however, analogous to its role in the budget process—one of gathering and organizing proposals for congressional consideration. In contrast, most questions of micromanagement are better suited to the executive branch, which has the more direct power to order or influence particular regulatory actions. Still, congressional oversight can play a role in probing regulatory decisions and seeking information for statutory overhaul.

For several reasons, oversight by both branches tends to favor micromanagement. First, there is the intimidating prospect of assembling the information necessary to any serious effort at large-scale coordination. Second, legislative change is time-consuming and difficult—as the Framers intended it to be. Third, the imperatives of electoral politics tend to force both branches to focus on short-run solutions to problems. Thus, it seems both easier and more profitable to leave cosmic issues and statutory revision for another day, and to concentrate on pending regulations.

Congress is not well suited to coordinate policy, whether the goal be macromanagement or the application of consistent principles to particular contexts. The reasons for this lie in its decentralization, which stems partly from Congress's institutional nature and partly from its current organization. Congress is a collectivity of 535 separately elected individuals. The self-interest created by its fragmented political bases sets distinct limits on the amount of centralization the institution will tolerate.[48] Congress is naturally

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prepared by rulemakers, and, more controversially, legislation granting the President the ability to direct agencies to decide a limited number of "critical" regulatory issues and to order changes in their decisions. *See id.* at 68-91; *see also* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975) (urging an enhanced presidential role in coordinating regulation).

[46] For a defense of congressional prerogative and performance, in sharp contrast to the ABA Commission's views, see SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION, pt. 5, at 6-7, 67-81 (Comm. Print 1977) [hereinafter FEDERAL REGULATION].

[47] Congress has often authorized the President to prepare government reorganization plans which, within certain limits, may transfer, consolidate, or abolish agency functions. 5 U.S.C. §§ 901-912 (1982 & Supp. IV 1986). The current statute forbids abolishing or transferring all the functions of an executive department or independent regulatory agency. *Id.* § 905 (Supp. IV 1986). Congress's desire to keep close control over reorganization authority is based on its recognition that the placement of a function in one agency rather than another can have important effects on substantive policy. *See generally* Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1 (noting that Congress has increasingly placed emphasis on its role as overseer of the executive branch, and has only grudgingly and reluctantly granted the power of reorganization). For many years, Congress subjected presidential reorganization plans to legislative veto. In 1984, Congress amended the statute to require the plans to be approved by joint resolution. 5 U.S.C. §§ 908-912 (Supp. IV 1986).

[48] *See* Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED 332-46 (L. Dodd & B. Oppenheimer 2d ed. 1981).

nonhierarchical; its characteristic process is one of bargaining.[49] Although little will be accomplished without some delegations of authority to make the decisions on which the fate of legislation rests, concentrated power threatens the members' capacity to serve their own constituents and tends to be resisted.

The centrifugal and centripetal forces within Congress are in constant tension and evolution.[50] In recent years, both Houses of Congress have markedly decentralized.[51] A central goal—the opening of policymaking to more diverse influences—has been achieved, but at substantial cost to both the capacity to legislate and the consistency of oversight. The story is one of overreaction to perceived abuses. By the early 1970s, power in Congress was widely perceived to be overly centralized.[52] A series of reforms produced today's congressional structure.[53] In the House of Representatives, under the aptly named "subcommittee bill of rights," a majority of a committee (instead of the chairman) now determines the number and jurisdiction of subcommittees.[54] In the Senate, informal assurances to each Senator of at least one good committee assignment have resulted in a subcommittee chair for most majority Senators.[55]

Because a subcommittee chair provides a platform for political advancement, committee members have an incentive to create many subcommittees.[56] Not surprisingly, subcommittees have proliferated; the number in the House rose by a third between 1971 and

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[49] Davidson, *The Congressional Budget: How Much Change? How Much Reform?*, in CONGRESSIONAL BUDGETING 155, 158 (W. Wander, F. Herbert & G. Copeland ed. 1984).

[50] *See generally* HOUSE COMM. ON RULES, 97TH CONG., 2D SESS., A HISTORY OF THE COMMITTEE ON RULES (Comm. Print 1983) (providing a history of varying degrees of centralization within the House).

[51] *See generally* A. MAASS, CONGRESS AND THE COMMON GOOD 54-63 (1983).

[52] A few powerful committees—and especially their chairmen, selected on the basis of seniority—controlled the congressional agenda in ways that caused other members to feel disenfranchised. The chairmen dominated the committees through their power to control the agenda, the staff, and the existence and composition of subcommittees. Davidson, *Subcommittee Government: New Channels for Policy Making*, in THE NEW CONGRESS 104 (T. Mann & N. Ornstein ed. 1981).

[53] Two related developments led to reform. First, the chairmen seemed increasingly out of touch with majority views in Congress and the nation. For example, the bottling up of civil rights legislation throughout much of the 1950s and 1960s exacerbated frustration with the seniority system. Second, the composition of Congress was changing. Increased turnover made the membership of both houses markedly more junior. Mann, *Elections and Change in Congress*, in THE NEW CONGRESS, *supra* note 52, at 37. New members not planning to spend a lifetime in Congress were unwilling to serve an extended apprenticeship before assuming power. *Id.*

[54] Davidson, *supra* note 52, at 108. Also, there are limits to the number of chairmanships anyone can hold; previously, one person could chair multiple subcommittees. *Id.*

[55] Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in THE NEW CONGRESS, *supra* note 52, at 140.

[56] M. FIORINA, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT 62-67 (1977).

1981.[57] The shift of power to the subcommittees has been real: the committees often ratify their action, and have not coordinated subcommittee action firmly.[58] Increasing the number of semiautonomous subunits necessarily makes it more difficult for the chamber to control its procedures.[59] Policy coordination, which is difficult enough for a body with a very crowded agenda, suffers.[60]

Recent congressional studies of the committee system have recommended reducing their number and broadening their jurisdiction.[61] These reforms have languished due to the reluctance of those controlling the present committees and subcommittees to give up their power. In the meantime, the fragmentation of oversight is sometimes extreme. For example, the Environmental Protection Agency reports to thirty-four Senate and fifty-six House committees and subcommittees.[62] So conducted, congressional oversight cannot hope to send an agency consistent signals about policy.[63]

Even if Congress does succeed in improving its own capacities for coordinating policy, much latitude—and need—will remain for the executive to act interstitially under the mass of statutes as they exist at any given time. One primary impetus for such activity is the likelihood of a disparity between theories of regulation held by the administration and the existing body of statutes and regulations. The ebb and flow of federal regulation has been considerable in recent decades. The 1970s witnessed a surge of new "social" regulatory statutes promoting health and safety in broad sectors of the economy.[64] These programs encountered complexities unknown to the older "economic" regulation that controlled entry and pricing in certain industries.[65] We entered an "age of rulemaking" and began developing administrative law to control the new programs.[66] By the end of the 1970s, however, a movement toward deregulation was evident. Long-simmering dissatisfaction with the inefficiencies

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[57] A. Maass, *supra* note 51, at 62; Davidson, *supra* note 52, at 109. A concomitant increase in congressional staff has occurred, mostly in the subcommittees. Malbin, *supra* note 55, at 140-42.

[58] A. Maass, *supra* note 51, at 62-63.

[59] The difficulty of legislating has risen: even if the committees usually ratify subcommittee action, legislation is still at peril at both stages of consideration.

[60] Ornstein, *The House and the Senate in a New Congress*, in The New Congress, *supra* note 52, at 379.

[61] *See, e.g.*, House Select Comm. on Committees, 96th Cong., 2d Sess., Limitations on the Number of Subcommittees and Subcommittee Assignments (Comm. Print 1980).

[62] *See* National Academy of Public Administration, Panel on Congressional Oversight of Regulatory Agencies, Draft Report 39 (1988). The Panel is considering a number of recommendations to Congress to make oversight more systematic, such as the adoption of an overall agenda for the review of statutory authorities. *Id.* at 85-86.

[63] *See* Bruff, *Legislative Formality, Administrative Rationality*, 63 Tex. L. Rev. 207, 229-33 (1984).

[64] *See generally* Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1278-95 (1986) (discussing the development of federal regulation of health and safety).

[65] C. Schultze, The Public Use of Private Interest 9-12 (1977).

[66] For the quoted phrase and the temper of the times, see Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 375 (1974).

of traditional economic regulation provided an early impetus.[67] But there was also substantial reaction against the stringent new programs of social regulation because they created large redistributions and had inefficiencies of their own.[68] By the early 1980s a period of experimentation with deregulation had borne fruit in such industries as airlines and banking. Then, to bring the story full circle, calls for "reregulation" followed as the costs of deregulation became evident. Today, there remain widely perceived needs to reconsider statutory policies.[69] Meanwhile, there is pressure to update policy to the extent that statutes permit.

Although some substantive statutory overhaul has resulted, most of the important developments have been more informal or indirect.[70] All three branches of the government have recently tried to improve their capacity to control administration within the parameters of existing statutes. Congress has experimented with various techniques to improve its oversight of the mushrooming bureaucracy.[71] The courts have developed new doctrines to provide closer review of both the substance and procedure of agency action.[72] And soon after enactment of the first major group of health and safety statutes, the Nixon administration initiated the first attempts at executive management of regulation.[73]

Executive oversight should not be designed to transfer statutory discretion from the agencies into the White House. The President's bureaucracy lacks the institutional capacity to take on such responsibilities; indeed, we require the full existing resources of the agencies to discharge them. Nor would Congress be likely to ratify such a transfer. Instead, there is a place for micromanagement: probing the agency's fact and policy judgments and ensuring that the agency considers factors of general importance to the President's policies, to the extent permitted by law.

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[67] *See, e.g.*, Federal Regulation, *supra* note 46, pt. 6 app. (1978) (providing case studies considering federal regulatory activities in ten major areas of the national economy).

[68] *See* B. Ackerman & W. Hassler, Clean Coal/Dirty Air 79-94 (1981) (describing the effects of social regulation concerning air quality); Lilley & Miller, *The New "Social Regulation,"* Pub. Interest, Spring 1977, at 49 (discussing economic and social problems presented by the "new social regulation" of the 1970s).

[69] Calls for reform have come from authors representing a wide political spectrum. *See, e.g.*, S. Breyer, Regulation and Its Reform (1982); G. Eads & M. Fix, Relief or Reform? Reagan's Regulatory Dilemma (1984); M. Weidenbaum & R. Penoyer, The Next Step in Regulatory Reform: Updating the Statutes (1983); Lilley & Miller, *supra* note 68.

[70] *See generally* Strauss, *Regulatory Reform in a Time of Transition*, 15 Suffolk U.L. Rev. 903 (1981) (explaining the types of federal regulatory reform and exploring the potential changes in the 1980s).

[71] See generally the valuable six-volume overview by the Senate Committee on Governmental Affairs, Federal Regulation, *supra* note 46 (1977-78).

[72] Rabin, *supra* note 64, at 1295-1315; Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359.

[73] *See infra* text accompanying notes 80-81.

Congress has recognized both the need for coordination of government policy and the President's unique capacity to provide it. A number of statutes confer managerial authority on the President. Their existence feeds the current debate over the President's power to control executive policymaking in statutory interstices. They also serve to show how Congress can go about creating and confining executive coordinating powers.

Since enactment of the Budget and Accounting Act of 1921,[74] the President has been responsible for compiling the yearly budget for the federal government and submitting it to Congress for consideration. In general, the Office of Management and Budget (OMB) controls both the budgetary and the legislative requests of federal agencies, including the independent agencies.[75] As a practical matter, OMB derives considerable leverage from this power of review. Congress has occasionally granted federal agencies an exception from one or both requirements, however.[76]

OMB also has power to control the agencies' demands for information from the public, under the Paperwork Reduction Act of 1980.[77] The independent agencies may overrule OMB directives under this statute by majority vote.[78] The component of OMB that administers the Paperwork Reduction Act, the Office of Information and Regulatory Affairs, also administers the President's program for coordinating policymaking.[79]

III. *The Evolution of Presidential Management Programs*

The first executive oversight program for rulemaking was the Nixon administration's "Quality of Life" review.[80] This program was announced as an interagency review of proposed regulations dealing with environmental quality, consumer protection, and other aspects of public health and safety. In practice the Quality of Life

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[74] Ch. 18, 42 Stat. 20 (codified in scattered sections of title 35 U.S.C.).

[75] For the origin and evolution of OMB's functions, see S. WAYNE, THE LEGISLATIVE PRESIDENCY (1978), and L. BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921-1979 (1979).

[76] *E.g.*, 15 U.S.C. § 2076(k)(2) (1982) (Consumer Product Safety Commission). The procedures for submittal and clearance of agency requests are set forth in OMB Circular A-19 (rev. 1979).

[77] Pub. L. No. 96-511, 94 Stat. 2812 (codified in scattered sections of titles 5, 20, 30, 42, and 44 U.S.C.).

[78] 44 U.S.C. § 3507(c) (1982).

[79] Stormy relations between OIRA and Congress due to the executive orders have led Congress to subject the head of the office to advice and consent. Continuing Appropriations, FY 1987, Pub. L. No. 99-591, 100 Stat. 3341 (1986). For OIRA's early history, see O'Reilly, *Who's On First? The Role of the Office of Management and Budget in Federal Information Policy*, 10 J. LEGIS. 95, 111-15 (1983).

[80] The Quality of Life program began in June, 1971. It is discussed in J. QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 117-42 (1976); *see also Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 60, 61 (1979) [hereinafter *Environmental Hearings*] (statement of John Quarles, former Deputy Administrator, EPA).

review program focused almost exclusively on regulations of the Environmental Protection Agency (EPA). EPA's summary of a new rule and its possible alternatives were sent to reviewing agencies (such as the Council on Wage & Price Stability), which had four weeks to comment, unless OMB extended the time.[81] The OMB staff integrated the comments and criticisms and transmitted them to EPA. The process sometimes prolonged rulemaking for many months. Quality of Life review brought outside views of regulatory costs and alternatives to EPA, with some effects on its policymaking.[82]

President Ford's Inflation Impact Statement program focused on the fiscal impact of regulations. By Executive Order No. 11,821, he authorized OMB to promulgate criteria for agencies to use in determining which proposals were "major" in their effects upon the overall economy.[83] Agencies' rulemaking staffs then prepared Inflation Impact Statements outlining the costs of the rules and furnished them to OMB.[84] It soon became clear, however, that a decentralized process that left the primary responsibility for impact assessment to the agencies would not affect policy choices as much as would external review. Charges were made that the Inflation Impact Statements were post-hoc justifications for decisions already reached rather than actual restraints on the excessive inflationary cost of rules.[85]

In 1978, President Carter issued Executive Order No. 12,044 requiring detailed regulatory analyses of proposed agency rules and review by the Executive Office of the President.[86] OMB subsequently issued guidance to the agencies on how to perform a regulatory analysis.[87] President Carter then created the Regulatory Analysis Review Group (RARG), composed of representatives from the principal economic and regulatory agencies.[88] RARG's purpose was to review a limited number of regulatory analyses having substantial economic impact. Its four-member executive committee included representatives from OMB and the Council of Economic Advisors (CEA) as permanent members; the other two memberships rotated every six months among the cabinet departments (excluding State and Defense) and EPA. RARG received staff support from the CEA and the Council on Wage and Price Stability (COWPS), and analyzed only the most important half-dozen proposed regulations each year. In the RARG review process, reports were drafted by the CEA and COWPS staff, commented on and agreed to by the permanent RARG members, and issued in final form for agency consideration.[89]

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[81] SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL REGULATION AND FEDERAL REGULATORY REFORM, H.R. Doc. No. 134, 95th Cong., 1st Sess. 506 (1976).

[82] For an example of a major EPA regulation that was affected by the review program, see Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc) (upholding a regulation reducing gasoline lead content that was affected by interagency review), *cert. denied*, 426 U.S. 941 (1976). In early 1977, the incoming Carter administration terminated the program. *See Environmental Hearings*, *supra* note 80, at 63-66.

[83] Exec. Order No. 11,821, 3A C.F.R. 926 (1974), *modified by* Exec. Order No. 11,949, 3 C.F.R. 161 (1976).

[84] OMB instructed agencies to include in the evaluation submitted "an analysis of the principal cost or other inflationary effects of the action[,] . . . a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts, and . . . a review of alternatives to the proposed action that were considered." Evaluation of the Inflationary Impact of Major Proposals for Legislation and for the Promulgation of Regulations or Rules, OMB Circular No. A-107 (Jan. 28, 1975) (rescinded by Memorandum to the Heads of Executive Departments and Agencies, Subject: Rescinding OMB Circulars A-85 and A-107 (Oct. 20, 1978)).

[85] O'Reilly & Brown, *In Search of Excellence: A Prescription for the Future of OMB Oversight of Rules*, 39 ADMIN. L. REV. 421, 427 (1987).

President Carter also created the Regulatory Council, a group consisting of the heads of regulatory agencies.[90] The Council's principal function was to develop and publish semi-annually the *Calendar of Federal Regulations*, which provided analytical synopses of 120 to 180 major regulations under development that were likely to have substantial economic or public impact. The Council also assisted regulators in developing cost-effective and consistent regulations. The Council then used the *Calendar* to help identify relationships among upcoming rules, and to develop coordinated plans for dealing with any significant interjurisdictional regulatory issues.[91] The Council also undertook numerous studies and projects designed to improve the regulatory process.

The Ford and Carter precedents influenced the Regulatory Reform bills drafted, but never enacted, between 1978 and 1981.[92] These bills foreshadowed OMB's subsequent role in the Reagan administration. The Office of Information and Regulatory Affairs (OIRA) within OMB was created by the Paperwork Reduction Act, a spinoff from the regulatory reform bills.[93] The Act's more stringent requirements for agency justification of record-keeping requirements that are imposed on the public provide a statutory basis for OIRA to involve itself in the detail of new agency rules because the rules frequently require submissions, reports, and surveys. This legislation was the formal beginning of an institutional OMB structure for rulemaking oversight. Also, all of the major bills gave key roles in oversight to OMB. The Reagan administration borrowed from the bills in the drafting of its first executive order in the first month after the change of administrations in 1981.

The Reagan administration's program for oversight of regulation is the most ambitious to date.[94] Executive Order No. 12,291, "Federal Regulation,"[95] requires executive agencies, to the extent permitted by statute, to observe cost-benefit principles in implementing regulations. The order requires executive agencies to evaluate proposed "major rules" (those with a significant effect on the economy) according to a prescribed "regulatory impact analysis."[96] The central innovations of Executive Order No. 12,291 are the mandatory character of its substantive requirements and its system for their enforcement by OMB.

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[86] Exec. Order No. 12,044, 3 C.F.R. 152 (1978) (revoked by Exec. Order No. 12,291). For "major" regulations, regulatory analysis was to contain "a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others." *Id.* at 154.

President Carter explained:

> Regulation has a large and increasing impact on the economy. Uncertainty about upcoming rules can reduce investment and productivity. Compliance with regulations absorbs large amounts of the capital investments of some industries, further restricting productivity. Inflexible rules and massive paperwork generate extra costs that are especially burdensome for small businesses, state and local governments, and non-profit groups. Regulations that impose needless costs add to inflation.
>
> Our society's resources are vast, but they are not infinite. Americans are willing to spend a fair share of those resources to achieve social goals through regulation. Their support falls away, however, when they see needless rules, excessive costs, and duplicative paperwork. If we are to continue our progress, we must ensure that regulation gives Americans their money's worth.

President Carter's Regulatory Reform Message to the Congress, 1 PUB. PAPERS 492 (Mar. 26, 1979). He also ordered that regulations be as simple and clear as possible, and that they not impose unnecessary burdens. *Id.*

[87] Memorandum from Wayne G. Granquist, Associate OMB Director for Management and Regulatory Policy to the Heads of Departments and Agencies, Regulatory Analysis (Nov. 21, 1978).

[88] For an overview of the Carter administration's regulatory management efforts, including RARG operations, see G. EADS & M. FIX, *supra* note 69, at 54-57.

[89] From 1977 to 1980, in support of RARG's efforts, COWPS filed 18 reports with 8 departments and agencies. Also, during the same period, COWPS issued 180 other reports (filings, letters, and testimony) commenting on programs and individual regulations. T. HOPKINS, T. LENARD, J. MORRALL & E. PINKSTON, A REVIEW OF THE REGULATORY INTERVENTIONS OF THE COUNCIL ON WAGE AND PRICE STABILITY: 1974-1980, at 2 (1981).

[90] Memorandum for the Heads of Executive Departments and Agencies, Subject: Strengthening Regulatory Management, PUB. PAPERS 1905 (Oct. 31, 1978).

[91] *See Regulation Reform Act of 1979: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 96th Cong., 1st Sess. 3-270 (1979) (testimony of OMB Director James T. McIntyre, Jr., CEA Chairman Charles L. Schultze, and EPA Administrator Douglas Costle).

[92] *See, e.g.*, SENATE COMM. ON THE JUDICIARY, THE REGULATORY REFORM ACT, S. REP. No. 284, 97th Cong., 1st Sess. 70 (1981); SENATE COMM. ON GOVERNMENTAL AFFAIRS & SENATE COMM. ON THE JUDICIARY, REFORM OF FEDERAL REGULATION, S. REP. No. 1018, 96th Cong., 2d Sess., pt. 1, at 17 (1980); HOUSE COMM. ON THE JUDICIARY, REGULATION REFORM ACT OF 1980, H. REP. No. 1393, 96th Cong., 2d Sess. 1 (1980). The bill passed in the Senate, 128 CONG. REC. 5297 (1982), but died in the House. *See* 128 CONG. REC. 25,662-63 (1982) (statement of Representative Dingell).

[93] The Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1982 & Supp. IV 1986), was passed as the only part of the package of Senate Government Affairs bills to have been relatively noncontroversial, while the regulatory reform bills stalled in that committee. *See, e.g.*, SENATE COMM. ON GOVERNMENTAL AFFAIRS, PAPERWORK REDUCTION ACT OF 1980, S. REP. No. 930, 96th Cong., 2d Sess. 15 (1980) [hereinafter S. [illegible] No. 930]. The office was established under 44 U.S.C. § 3503 (1982).

[94] *See generally* Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1235-42 (1981); Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1268 (1981).

[95] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 431-34 (1982).

Section 2 of the order requires agencies, to the extent permitted by law, to "adhere" to five general principles "[i]n promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation." These principles require agencies to base administrative decisions on "adequate information concerning the need for and consequences of proposed government action," and to set regulatory objectives, order regulatory priorities, and undertake regulatory action in a way that will maximize the net benefits to society when costs and benefits are compared.[97]

Section 3 of the order requires agencies to issue preliminary and final Regulatory Impact Analyses (RIAs) in connection with major rules. An RIA must include statements of the anticipated costs and benefits of the proposed rule, the anticipated incidence of those costs and benefits, the net anticipated benefits of the regulation, and other potentially more cost-effective regulatory possibilities, with an explanation, if appropriate, of the legal reasons why the most cost-effective means of achieving the anticipated benefits cannot be adopted. The cost-benefit analysis mandated by the order expressly requires the inclusion of beneficial or adverse regulatory effects that cannot be quantified in monetary terms.[98]

On their face, these provisions do not dictate particular regulatory decisions. The terms "cost" and "benefit" are not defined by the order, and the inclusion of unquantifiable costs and benefits in the required calculus can afford agencies significant discretion. The section 2 principles are, however, expressly intended to require agencies to weigh competing values in a particular way, and to be prepared to justify regulatory decisions according to a generally prescribed form of analysis. In this sense, section 2 is not neutrally "procedural." The order is obviously meant to affect the substance of regulation.

An agency must transmit each proposed major rule, together with a preliminary RIA, to the Director of OMB sixty days prior to the publication of any notice of proposed rulemaking. OMB then has sixty days to review the submission, and may require the agency to consult concerning the preliminary RIA and notice of proposed rulemaking, and to refrain, subject to judicial or statutory deadlines, from publishing its proposal until review is concluded. The order provides, however, that these review powers shall not "be construed as displacing the agencies' responsibilities delegated by law."[99]

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[96] *Id.* § 3, 3 C.F.R. 128-30.

[97] *Id.* § 2, 3 C.F.R. 128.

[98] *Id.* § 3, 3 C.F.R. 128-29.

[99] *Id.* at 130.

Subsequently, Executive Order No. 12,498 was promulgated to establish a "regulatory planning process."[100] This order requires the head of each executive agency to send OMB a "draft regulatory program" that describes "all significant regulatory actions" to be undertaken within one year. OMB reviews the plan for consistency with administration policy, and a final plan is published. Executive Order No. 12,498 supplements the prior order by giving agency heads and OMB more power over the early stages of the regulatory process. This new authority reduces the capacity of agency staff components to develop a regulatory initiative to the point that it develops a constituency—and a life—of its own. Professors Strauss and Sunstein elaborate this point:

> [The orders respond to the] perception that agency heads are, to an undesirable degree, the captives of their own staffs rather than politically powerful managers of agency business. Courts have created a number of techniques to attempt to respond to the problem, including review to ensure that the benefits of regulation are roughly commensurate with the costs. The value of such techniques is, however, severely diminished by institutional limits of the courts, which are not well-equipped to calculate the costs and benefits of regulatory initiatives and are incapable of imposing a hierarchical or coordinative structure. The orders represent an effort to deal with the general problem of uncoordinated and insufficiently accountable administrative decisions.
>
> While the orders on their surface mark a major enhancement of presidential authority, a significant element of their attractiveness lies in their potential to expand the effective authority, accountability, and oversight capacity of the agency head. This potential is particularly strong for Executive Order 12,498. Requiring the development of an agency regulatory plan should have the same effect on the regulatory side as requiring agency presentation of a budget does for fiscal planning. It will provide an annual opportunity for the agency head to focus on the work of her agency in a planning rather than a reactive mode, stressing broad vision and priority setting, and involving her early enough that one may expect her to have a significant impact on options considered. Fewer staff deals will have been cut. The requirement of early disclosure of plans—through ventilation of alternatives (in the case of Executive Order 12,291) and annual statement of the regulatory plan (in the case of Executive Order 12,498)—is thus a means of ensuring that regulatory policy is set by agency heads rather than staffs. In this respect, the two orders may be understood, not only as efforts to enhance presidential or OMB power as against agencies, but also as a means of enhancing the agency

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[100] 3 C.F.R. 323 (1985). *See generally* Note, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63 (1986) (outlining the changes in presidential oversight of regulatory policies through Executive Order No. 12,498).

head's effective control over her staff.[101]

Like the Reagan orders, any permanent regulatory management program must address inherent tensions between political appointees and the career bureaucracy. That topic follows.

IV. *OMB and the Agencies: Comparative Competence and Power*

A. Vantage Points: The Place of OMB and the Agencies in the Executive

OMB is the President's principal institutional means for supervising the federal bureaucracy. Recast from the old Bureau of the Budget, OMB consists of a few hundred civil servants (most of them budget officers) and a growing cadre of political appointees at the top. Since the 1970s, OMB staffing has become increasingly political, with a sharp upsurge from nine to twenty-five Schedule C political appointees in the first Reagan term alone.[102] The Reagan administration also kept close central control over political appointments within the agencies.[103] Both developments respond to the growth of the regulatory bureaucracy since 1970. They reflect presidential efforts to control policy both by designing new functions for OMB and by using traditional executive powers more effectively.

Budget functions have long dominated OMB, to the dismay of some political scientists who yearn for more attention to management.[104] In budgeting, OMB's classic stance has been the skeptical reviewer of requests from agencies that are always wanting "too much." Indeed, a famous theory of bureaucratic behavior holds that the principal endeavor of agencies is to expand their budgets, in search of the power and perquisites that more money can buy.[105] Whether or not this theory fits reality, to the extent that it is accepted within OMB, it affects OMB's behavior.

Attitudes born of the budget process probably carry over to supervision of rulemaking by OIRA.[106] True, the functions are somewhat different—no formal "regulatory budget" yet exists, "appropriations" for which must be coaxed from Congress. Although the direct tradeoffs between scarce federal dollars that

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[101] Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 187-88 (1986) (footnotes omitted).

[102] SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS, S. REP. NO. 156, 99th Cong., 2d Sess. 20 (1986) [hereinafter S. REP. NO. 156].

[103] Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 59 (1987). Pendleton James, Director of the White House Personnel Office, stated: "We handled all the appointments: boards, commissions, Schedule C's . . . . [I]f you are going to run the government, you've got to control the people that come into it." *Id.* at 59.

[104] *E.g.*, Benda & Levine, *OMB and the Central Management Problem: Is Another Reorganization the Answer?*, 46 PUB. ADMIN. REV. 379, 379 (1986).

[105] W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971).

[106] *See supra* text accompanying note 93. There is also some functional overlap. OMB reviews rules to ensure that fiscal year and administration budgetary goals are achieved. This review centers on entitlements programs, such as student loans and health care financing.

characterize the budget process do not occur in the oversight of regulation, the perspective of anyone working in OMB is determined by its placement at the apex of the executive branch. An office that sees the full scope of federal regulation must be impressed by its net burdens, and is likely to doubt that any particular rule is indispensable to national welfare. Analogies to budgeting, however, can ignore the principal differences between these functions: unlike regulatory review, budget requests are not confined by preexisting statutory standards, and they lead to automatic legislative resolution of policy issues.[107]

For similar reasons of perspective, agency personnel are likely to view OMB as institutionally overcautious about regulation. Focusing on the statutory missions committed to them, bureaucrats lack any incentive to view their own regulations in competition with other claims for scarce national resources.[108] Therefore, any system for central oversight of regulation will produce conflict between the regulators and their overseers, regardless of the politics of the administration in power.

Former OMB Director James C. Miller III has argued that decentralized regulation advantages control by well-organized interests.[109] This conclusion requires some qualification. The pressures on agencies from all three branches of government and private interest groups foster a quite complex and not readily predictable set of bureaucratic motivations. Traditional theories that agencies are subject to capture by their regulated interests do not account for the complex constituencies and expanded rights of participation that characterize modern regulation.[110] For example, EPA encounters

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[107] Strauss & Sunstein, *supra* note 101, at 195.

[108] As economist Robert Crandall has observed:

> The Administrators of the Occupational Safety and Health Administration, the Environmental Protection Agency, or the National Highway Traffic Safety Administration, for example, are not expending their own budgetary allotments when they mandate outlays by private firms on pollution or safety devices. Their principal goal is to achieve an improvement in environmental quality or human health and safety at a minimum political cost, not necessarily at the lowest social cost. Since few citizens can possibly know how much alternative policies will cost them—in terms of reduced resources for purchasing food, shelter, medical care, or general amusement—it is exceedingly unlikely that the decision which minimizes the social cost of government regulation is the one which appears politically the most prudent to the agency Administrator.

Administrative Procedure Act Amendments of 1978, Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 389-90 (1978).

[109] Miller, Shughart & Tollison, *A Note on Centralized Regulatory Review*, 43 PUB. CHOICE 85, 86 (1984); *see also* R. NOLL, REFORMING REGULATION 40-42 (1971) (stressing that only well-organized interests such as regulated groups have the resources to politically or legally affect regulatory agency change).

[110] Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 190-91 (1978).

effective pressure from both industry and environmental groups. There does seem to be a tendency to compromise among effectively organized interest groups, which often results in service to a fairly broad range of interests.[111] Director Miller has argued that centralized review of regulation limits special interest influence in two ways. First, it adds lobbying costs while potential gain remains the same. Second, because reviewers deal with everyone, there is no reason to expect capture by anyone.[112] Again, qualification is necessary. Political appointees at OMB are naturally more responsive to an administration's friends than to its enemies. Because the issue is marginal gain from the presence of additional process, any group that expects a friendlier reception from OMB than from an agency will favor central review, and will be willing to expend resources in hopes of influencing its outcome. This suggests that the way in which OMB review is actually performed will determine its tendency to reinforce or dampen special interest influence.

Executive oversight also serves separation of powers goals. Congressional oversight of regulation is constant. The President needs to assert his own claims over the executive branch to forestall the formation of "iron triangles" by which agencies, interest groups, and congressional committees might otherwise gain control of regulatory policy. A President needs to be especially concerned with the formation of alliances between agency staff who oppose his policies and committees in a House of Congress that is organized by the party out of power. Because congressional oversight is decentralized, it does not usually send consistent signals to agencies. Only the executive branch, with its heirarchical organization, has the capacity to formulate a consistent set of instructions to the bureaucracy. This provides an opportunity to promote values held by the administration, thereby maximizing the political accountability of regulation.[113]

B. Analysis of the Costs and Benefits of Regulation

The requirement of Executive Order No. 12,291, that agencies perform regulatory analyses to support their rules, had two sources. One was the similar analyses required by executive orders in previous administrations. The other was an existing need to explain the basis for rules to survive judicial review.[114] These developments revealed the major weakness of controlling discretion by means of formal analysis: Either the initial analyst or the reviewing entity may

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[111] *See generally* Bruff, *supra* note 63.

[112] Miller, Shughart & Tollison, *supra* note 109, at 85.

[113] *See generally* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORGANIZATION 81 (1985).

[114] *See generally* Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985) (analyzing the development of judicial review of administrative action and its impact on administrative law); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (examining the use of hard-look review in administrative actions and its effect on administrative law).

disguise a predetermined substantive preference in the garb of considered discourse.[115] Counteracting this weakness should be a major purpose of those who guide the activities of both analysts and reviewers.

Executive review of regulatory analysis can promote its consistent performance in ways that judicial review cannot, for two reasons. First, although courts are decentralized, the executive can review all analyses according to a single set of criteria.[116] Second, although courts do not attempt to require the "best" analyses, just acceptable ones, the executive can pursue both quality and consistency in the agencies' analytic techniques.

Executive Order No. 12,291 requires cost-benefit analysis, which has always been controversial for several reasons.[117] First, the uncertainty and difficulty of the process may render it especially vulnerable to manipulation in service of predetermined outcomes. Second, it tends to be biased against regulation because the direct costs of a rule are likely to be more visible and quantifiable than are its benefits.[118] Third, cost-benefit analysis is usually the province of economists, whose professional orientation favors private ordering and clashes with that of health scientists, who are more risk-averse to possible threats to public health.[119]

What matters most about cost-benefit analysis is the spirit in which it is performed. One skeptic concedes that it is valuable if used by someone "committed to the underlying goals and spirit of a regulatory program," but not if used to mask anti-regulatory bias.[120] Its defenders point out that its stated purpose is to ask questions about rules that any rational observer would address.[121]

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[115] *See* Bruff, *supra* note 63, at 238-40. This weakness of judicial review was identified very early. *See* SEC v. Chenery Corp., 318 U.S. 80, 99 (1943) (Black, J., dissenting). For its presence in an earlier executive order program, see *supra* text accompanying notes 83-85.

[116] For the difficulties the courts face in imparting consistent administrative law commands to agencies, see Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

[117] *Compare* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) *with* Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984) (refuting Kennedy's critique of cost-benefit analysis).

[118] *See* McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1279-83 (1987).

[119] *Id.* at 1266.

[120] NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES 44 (1987) [hereinafter NAPA REPORT] (providing separate views of Richard Wegman). This Report, by an able panel of the National Academy, resulted from an empirical and normative inquiry into presidential management of agency rulemaking in the Reagan administration.

[121] *See, e.g.*, Scalia, *Regulatory Review and Management*, REG., Jan./Feb. 1982, at 19, 19-20.

Cost-benefit analysis can reveal and counteract biases that favor excessively stringent regulation. Disputes between OMB and the agencies have persisted concerning two analytic techniques with strong implications for the desirable stringency of regulation. First, agencies have pressed for the use of multiple conservative assumptions in environmental decisions, which favors strict regulation. OMB has urged the use of discount rates for future illnesses,[122] which implies relaxed regulation. Similarly, OMB has pursued efficiency by pressing agencies to replace traditional "command and control" regulations, such as engineering controls, with innovative market-based strategies, such as auctions of rights to pollute.[123]

A second, less controversial, technique is cost-effectiveness analysis. It avoids direct weighing of such imponderables as the value of life by simply asking whether a given strategy is the cheapest means to a posited goal. Present regulations vary greatly by this criterion.[124] This technique's use can help to equalize burdens of regulation, minimizing differences in costs to the economy per unit of gain, by such measures as statistical lives saved. Much of the existing disparity in approach, however, is built into the statutes due to their episodic enactment or because other values intrude, such as equalizing risks to groups of workers regardless of cost differences.[125]

The role of regulatory analysis in undergirding an agency's regulations—and in informing judicial review—is shown by several examples from rulemaking by the National Highway Traffic Safety Administration (NHTSA). In *Center for Auto Safety v. Peck*,[126] the court upheld NHTSA's relaxation of its standard for automobile bumper crashworthiness, although the regulation altered previous agency policy. The court relied heavily on the agency's regulatory analysis, which comprehensively analyzed the costs and benefits of nine alternative standards.[127] NHTSA had estimated that requiring bumpers to survive collisions at 2.5 mph would yield average net benefits per car of $42 more than the preexisting 5 mph standard.[128]

On the other hand, in the celebrated *State Farm* case,[129] the Supreme Court held that NHTSA's rescission of its automobile passive restraint regulation was arbitrary and capricious.[130] An otherwise comprehensive regulatory analysis had failed to consider a major alternative to rescinding the existing standard: requiring airbags.[131] Thus, requirements for persuasive analysis restrict an agency's discretion to alter a previous policy that was itself carefully justified.

Cost-benefit analysis has also led NHTSA to impose new regulations. In 1983, NHTSA required new automobiles to have center high-mounted stop-lamps.[132] The regulation followed field experiments with various types of stop-lamps, and reflected NHTSA's estimate that the ones required would prevent 40,000 injuries and over $400 million in property damage annually, at a cost of $70 million per year.[133]

C. *The Nature of OIRA Oversight*

Review of rules within OIRA is generalist in nature. It is performed by "desk officers," who are typically young economists, lawyers, or policy analysts with little prior experience in government or with the programs they oversee. Because most review is performed by the individual desk officers, OIRA is rather decentralized. The consistency of desk officer review is reduced by the lack of formal training programs or detailed written instructions on their tasks; on-the-job training is to suffice. Because OIRA reviews all rules of covered agencies, volume precludes detailed analysis of rules. Desk officers sort new rules to identify the most important, and dispose of most rules quickly.[134]

The goals of review in OIRA are based upon a recognition that, like any other outside review, executive oversight can make regulation more reasoned by forcing articulation of the basis of proposals. OIRA review is closely similar to the generalist "hard look" review of the courts, which asks whether regulations are persuasively reasoned and consistent with the agency's other policies and its statute.[135] Thus, the executive can both pursue optimal policy and search out analytic errors that would otherwise cause problems in court.

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[122] OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1988—MARCH 31, 1989, at 35-37 (1988) [hereinafter 1988-89 REGULATORY PROGRAM].

[123] OMB has urged EPA to adopt such an approach for the protection of stratospheric ozone. *See* 53 Fed. Reg. 30,566 (1988) (to be codified at 40 C.F.R. pt. 82).

[124] NAPA REPORT, *supra* note 120, at 2, 30; *see also* Lilley & Miller, *The New "Social Regulation,"* 47 PUB. INTEREST 49, 52-58 (1977) (concluding that the regulatory decisionmaking process is inefficient and leads to higher costs than are necessary to achieve stated objectives).

[125] *See* G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 687 (3d ed. 1986).

[126] 751 F.2d 1336 (D.C. Cir. 1985) (Scalia, J.).

[127] *Id.* at 1342, 1362-66; *see also* South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 880-84 (4th Cir. 1983) (relying on regulatory analyses to uphold a rule), *cert. denied*, 465 U.S. 1080 (1984).

[128] OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1987—MARCH 31, 1988, at xviii (1987) [hereinafter 1987-88 REGULATORY PROGRAM].

[129] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[130] *Id.* at 40-57.

[131] *See* McGarity, *supra* note 118, at 1327.

[132] 48 Fed. Reg. 48,235; 48,235 (1983).

[133] 1988-89 REGULATORY PROGRAM, *supra* note 122, at 16, 31.

[134] OMB has preferred to review all rules rather than to allow agencies to apply criteria defining rules meriting review. As a result, OMB's latest figures show that in 1987, 70.5% of the rules were approved "without change," 23.7% were approved "with change," 2.5% were "withdrawn by agency," and 0.4% were "returned for reconsideration." *Id.* app. IV at 553.

[135] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-44 (1983). The NAPA REPORT, *supra* note 120, quotes an OIRA staff member as stating that the goal is to obtain a "common sense," outside review of the agency's product. *Id.* at 39; *see also* J. LASH, K. GILLMAN & D. SHERIDAN, A SEASON OF SPOILS 24 (1984) (noting

Of course, it is also possible for OIRA to introduce rather than to remove regulatory defects. A certain amount of tinkering with rules probably results from the efforts of desk officers to justify their own existence.[136] That effect, however, probably attends any scheme for centralized review.

OIRA's principal officers do not expect expertise or research from the desk officers. It would not be sensible to do so, in view of the vastly greater expertise and resources of the agencies. For example, EPA, with a staff of about 10,000, submits all its rules to four desk officers in OIRA, who receive some assistance from other OIRA and budget personnel.[137] These officers have neither the time nor the expertise to evaluate conflicting interpretations of technical data in a rulemaking.

In this system, tension with agency heads is automatic. Because the agency heads typically are not technical experts in their regulatory fields, they have already provided generalized review of a regulation that they send to OMB. Moreover, they regard themselves as cooperative in achieving the goals of the administration that appointed them. The premise of centralized review, then, is that the judgment of the political appointees requires an outside check—that their judgment is affected by exposure to daily pressure from career staff, the interest groups, and congressional committees, or at least by a natural overcommitment to the statutory mission of the agency.[138]

Agency officials have often called for OIRA to be more selective in its review.[139] Thus, OMB is perceived to suffer priority problems. Essentially, the complaint is the one so often lodged against agencies, that there is too much burdensome process and delay with too little result. This reflects on the judgment of desk officers in selecting issues to discuss with agencies; rules that receive only cursory

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that former OIRA Deputy Administrator Tozzi claimed he could "tell in about four minutes if a rule made sense").

[136] S. Rep. No. 156, *supra* note 102, at 19. The Committee Print quotes a former EPA desk officer at OMB as stating that "[a] good desk officer does change a rule. To make your mark, you get changes made. I felt kind of funny handing [my supervisor] back a rule saying it was consistent [with Executive Order No. 12291]." *Id.*

[137] *Id.* at 18-19.

[138] *See* Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981). The D.C. Circuit noted:

> Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

Id. The D.C. Circuit's analysis is reminiscent of political scientist James Q. Wilson's observation that if agencies are captured by anyone, it is by their staffs. *See The Dead Hand of Regulation*, 25 Pub. Interest 39, 48 (1971).

[139] NAPA Report, *supra* note 120, at 39.

attention are not much delayed. Although OIRA has recently instituted a tracking process for regulations under review,[140] controversy between a desk officer and agency personnel is the typical mechanism for bringing issues to the attention of senior officers in OIRA and OMB. Thus, although OIRA lacks formal appeals processes, issues percolate up through the bureaucratic chains in the agencies and in OMB until they are resolved.

The presence of OMB's review program has led to the formation of "mini-OMBs" in the agencies to mimic OIRA review, in hopes of forestalling embarrassment from negative comments by OIRA.[141] Some of the conflict inherent in the program then shifts into the agencies, where the mini-OMBs (which are usually in the agency head's office) struggle for power with the program offices. This development adds a new level of clearance and delay to the rulemaking process, unless offset by speedier OMB review.[142] If the mini-OMBs become a permanent feature of the government scene, OMB might be able to shift its emphasis toward macromanagement issues such as rationalizing statutory authorities.

At present, due to lack of resources OMB cannot provide much coordination on issues concerning more than one agency. Some critics consider the Carter administration's RARG[143] to have been better adapted for in-depth review, on grounds that it provided a mechanism for rethinking statutory schemes, for balancing major regulations with other goals, and for aggregating experience with regulatory analysis.[144] A recent study prepared by the National Academy of Public Administration (NAPA Report) recommends creating a regulatory analysis office for these purposes.[145] At present, however, OIRA does have a group of "superanalysts" review agencies' analyses, seeking improvements in the technique. And whatever advantages the Carter administration's process may have had in depth of inquiry were won at the cost of sharply reduced coverage, because only a handful of regulations were reviewed each year.

D. *Bargaining in the Shadow of Presidential Power*

Executive Order No. 12,291 states that it is not to be construed as

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[140] Under this tracking process, a briefing book for the senior officers gives the status of significant regulations and provides an opportunity to monitor the desk officers.

[141] NAPA Report, *supra* note 120, at 39.

[142] *See* General Accounting Office, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulations 51 (1982).

[143] *See supra* text accompanying notes 88-89.

[144] Napa Report, *supra* note 120, at 40.

[145] *Id.* at 41. The Report also suggests creating a parallel office within the General Accounting Office or the Office of Technology Assessment. *See id.*

"displacing the agencies' responsibilities delegated by law."[146] OMB's formal power, then, is limited to "jawboning" the agencies: arguing over proposals; delaying the issuance of regulations while persuasion is sought; and, ultimately, placing critical comments in the public file to which the agency must respond. How does this work in practice? The NAPA Report concluded that "OMB arguments are more than advisory but still less than mandatory. The review process is more one of negotiation and accommodation than of agency initiatives being overruled by OMB demands. Agencies are not monolithic, and political appointees frequently differ with career employees."[147]

This assessment seems generally correct, with some qualifications. The system is built for both conflict and compromise. Consider the advantages held by each of the two parties. An agency has an initial advantage because it sets the parameters of the debate. Still, agencies draft their rules to survive the anticipated nature of OMB review.[148] Thus, OMB has more pervasive influence than raw statistics on rules altered during its review would reveal.[149] Summary rejection of an agency submission is rare. Negotiations usually produce tradeoffs at the margins of the agency proposal (as, indeed, they do in the budget process).[150] An agency also has massive advantages in the size and expertise of its staff, and can respond in depth to any position taken by OIRA. An agency displeased by an OMB position, while appealing within the executive branch, can seek allies among the interest groups or in Congress.[151] Finally, agencies retain the formal authority to promulgate rules, and can do so if they are willing to persist in opposing OIRA's point of view. When statutory or judicial deadlines for rulemaking loom, this authority gives agencies considerable leverage with OIRA.

OMB, however, has advantages of its own. First, there is the power of persuasion, which varies with the cogency of its positions and the power of the individuals asserting them. Second, OMB can use the threat of further delay to press acceptance of its views. Experience has shown this to be a powerful tool. Third, OMB can play on the allegiance to the administration of senior political appointees in the agency in an effort to sway them from positions generated by

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[146] Exec. Order No. 12,291, § 3(f)(3), 3 C.F.R. 127, 130 (1982), *reprinted in* 5 U.S.C. § 601 note at 431-34 (1982).

[147] NAPA REPORT, *supra* note 120, at 26.

[148] Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 41, 45-50 (1984).

[149] *See supra* note 134.

[150] *See* NAPA REPORT, *supra* note 120, at 27-28.

[151] G. EADS & M. FIX, *supra* note 69, at 135 conclude:

> [Case studies involving] OSHA and EPA . . . illustrate . . . the limited powers, even under the broad Reagan executive order, that the White House actually has to force regulatory changes on unwilling agencies if such agencies are prepared to protest the changes all the way to the president and to leak word of their protest to the press.

career staff.[152] Here too, OMB has repeatedly demonstrated its practical power. Fourth, OMB's leverage depends on its other powers over the agencies: its budget and legislative clearance functions; its statutory power to control requests for information from the public; and, ultimately, its ability to request the President to remove an uncooperative official. Given the likelihood that an agency's budget and legislative program eclipse any particular regulation in its priorities, this may be the most important element of OMB's bargaining power.

Much depends on the bureaucratic level that a particular controversy reaches, and on the agency's power within the administration. No OIRA desk officer can realistically threaten to slash an agency's budget, but the OMB Director can. A Deputy Assistant Secretary in an agency cannot realistically threaten to appeal to the President, but the Secretary can. As with other issues in the bureaucracy, continuing controversy over a rule tends to rise up the chain of command in both the agency and OMB until resolution is reached. Final compromise on a relatively controversial rule will be reached among the senior political appointees in the administration. This does not mean, however, that OMB and the agency will be evenly matched in the bargaining. Several of the agencies whose rules have produced frequent controversy with OMB (EPA, FDA, and OSHA) are headed by subcabinet administrators who lack the "clout" of the old-line cabinet departments such as State and Treasury. With regard to the health and safety agencies, OMB may truly be the "toughest kid on the block,"[153] able to impose its will if its senior officers are persistent.[154]

Because agency heads and senior OMB oficals deal with each other on a multitude of issues, each has a strong incentive to reach compromise on controverted issues arising under the executive orders, rather than spend limited institutional capital on squabbling over a particular regulation.[155] Perhaps for that reason, the ultimate steps of appealing to the presidential level[156] or issuing a rule over OMB's objections are rare.

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[152] *See* G. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 67 (1987). Professor Bryner has noted that:

> There have been few disagreements between agency heads and officials of the regulatory review bureau in the Office of Management and Budget; the few times that the head of OSHA or EPA have tangled with OMB reviewers are rare, attention to ideology in appointments having assured general agreement in executive agencies over policy concerns and priorities.

Id. (citation omitted).

[153] *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, REG., MAR./APR. 1981, at 14, 22 (quoting James C. Miller, former head of both OIRA and OMB).

[154] Of course, contests for power between agency and White House staff long predated the Reagan administration. *See* SUBCOMM. ON EMPLOYEE ETHICS AND UTILIZATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, PRESIDENTIAL STAFFING—A BRIEF OVERVIEW, H.R. REP. NO. 17, 95th Cong., 2d Sess., 59-61 (1978).

[155] *See* Olson, *supra* note 148, at 45-50.

In the early years of the program, EPA did issue one regulation without OMB clearance, and received an immediate threat of retaliation.[157] More recently, the Department of Agriculture sent OIRA a draft of a proposed rule deleting requirements that meat food labels disclose the use of mechanically separated meat (MSM).[158] Sausage makers had petitioned for the change on grounds that consumers would not buy products containing MSM. OIRA returned the rule to USDA, objecting that the costs of the rescission in reducing informed market decisions would outweigh its benefits.[159] USDA published the proposed rule anyway.[160] In this case, OIRA could claim the role of protector of the general public's interest against special interest pressures, but could not claim victory.

During the eight years of the Reagan administration, the executive order program had time to evolve and mature. The next two sections of this Article portray such a process, with early controversies leading to procedural compromise and improved regularity. A program that had a distinctly experimental flavor in 1981 has achieved tentative acceptance in the executive branch.[161]

V. *Fidelity to Statutory Authority*

A. *Reconciling Statutory Commands with Administration Preferences: "Regulatory Relief" in the Reagan Administration*

Although the Reagan administration's regulatory management program is constitutional on its face, its implementation has the potential to transgress substantive or procedural statutory limits.[162] Of course, all executive activity carries the potential for straying beyond legal limits. The question concerning this particular program is whether one of its announced purposes has placed an undue strain on fidelity to statutory requirements. That purpose is deregulation, which, if pursued for its own sake rather than as a result of a

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[156] During the existence of the Presidential Task Force on Regulatory Relief, it received only one appeal of a proposed rule. *Id.* at 44.

[157] *EPA: Investigation of Superfund and Agency Abuses: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. pt. 3, at 7-8 (1984) [hereinafter *Superfund Hearings*] (testimony of former EPA Chief of Staff Daniel).

[158] Burros, *Eating Well*, N.Y. Times, Sept. 21, 1988, at C8, col. 3.

[159] Letter from Jay Plager, Administrator, OIRA, to Christopher Hicks, General Counsel, USDA (Aug. 18, 1988).

[160] 53 Fed. Reg. 35,089 (1988) (to be codified at 9 C.F.R. pt. 317) (proposed Apr. 26, 1988).

[161] M. GOODMAN & M. WRIGHTMAN, MANAGING REGULATORY REFORM: THE REAGAN STRATEGY AND ITS IMPACT 73 (1987) (stating that "[t]he goals have filtered down through the bureacracy and, to a remarkable extent, they have been accepted across regulatory agencies").

[162] *See generally* Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59 (1981); Symposium, *Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195 (1981).

careful review of regulations, can undermine compliance with statutes that mandate regulation.[163]

Both of the executive orders that create the present regulatory management system include among their purposes "to reduce the burdens of existing and future regulations."[164] Indeed, the Reagan administration's first day saw creation of the high-visibility Task Force on Regulatory Relief, with the Vice President as chair and cabinet officers as members. Its final report in 1983 claimed to have "rationalized the rulemaking process and slowed the growth of new rules."[165]

This theme has persisted. President Reagan's introduction to his *Regulatory Program* for 1988-89 stated his belief "that American life is burdened by too much regulation and that true regulatory reform must involve regulatory reduction."[166] The President's message went on, however, to endorse "the development of useful regulations that will increase benefits to society as a whole," and to express confidence that his successor "will want to continue this endeavor to serve the public interest by insisting that regulatory activity be productive."[167]

If a regulatory management program is to succeed, it must not cause rules to be invalidated by reviewing courts. Recent Supreme Court decisions have set the parameters for judicial review of rulemaking. The Court has tried to achieve two somewhat inconsistent purposes: to allow political oversight to operate freely, yet to bind final agency decisions to law. The two most important cases illustrate the tensions.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[168] the Court considered the amount of latitude that courts should give to agencies' interpretations of their governing statutes. It allowed the EPA to reverse preexisting policy in favor of an approach to air pollution that met the administration's efficiency criteria.[169] In a departure from earlier cases, the Court called for a determination "whether Congress has directly spoken to the precise question at issue" in the text or legislative history of a statute.[170] If Congress has spoken clearly, its will governs, but if the statute is "silent or ambiguous," the agency's interpretation prevails if "reasonable."[171] The Court's rationale for endorsing the interpretive authority of agencies emphasized political accountability; an agency may "properly rely upon the incumbent administration's views of wise policy to inform its judgments."[172]

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[163] A sign of deregulation for its own sake in the Reagan program is the use of categorical waivers of OMB review for deregulatory actions, for example, relaxations of pesticide tolerances and the deletion of listed toxic water pollutants. *See* OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1985—MARCH 31, 1986, at 581 (1985).

[164] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note at 431-34 (1982); Exec. Order No. 12,248, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C.A. § 601 app. at 296-97 (West Supp. 1988).

[165] OMB, PRESIDENT'S TASK FORCE ON REGULATORY RELIEF FINAL REPORT (1983).

[166] 1988-89 REGULATORY PROGRAM *supra* note 122, at vii.

[167] *Id.* at viii.

[168] 467 U.S. 837 (1984).

[169] *Id.* at 845-66. *See generally* Landau, Chevron, U.S.A. v. NRDC: *The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. 285 (1985).

Although controversy surrounds *Chevron*, it has had considerable impact on the lower courts.[173] *Chevron* altered prior law by denying courts the power to decide issues of statutory interpretation that depend on the overall structure and purposes of the statute. *Chevron's* critics regard that role as a traditional preserve of the judiciary.[174] Perhaps because of that tradition, the Court's later cases have evinced some doubts about *Chevron's* sweep.[175]

The Court's earlier decision in *State Farm*[176] invalidated NHTSA's attempt to conform its policy to administration goals by rescinding its passive restraints regulation. One can reconcile these two cases on the ground that in *State Farm* the agency insufficiently explained the fact and policy bases of its action, whereas in *Chevron* the agency passed that test. Nevertheless, by endorsing active judicial review of an agency's support in the administrative record for any change in the regulatory status quo, the Court slowed administrative efforts to alter existing regulations.[177]

From the outset, the Reagan administration's regulatory relief emphasis has been difficult to reconcile with the legislative history of some of the most stringent health and safety statutes. These statutes were passed in the early 1970s, in an era when congressional sensitivity to the cost of regulation was low.[178] In the absence of comprehensive reform of these statutes, which has not occurred, the administration has struggled to accommodate its philosophy of government with statutory commands premised on a need for aggressive regulation. As *Chevron* and *State Farm* illustrate, the results in court have been mixed.

Not surprisingly, most of the controversy that has surrounded the regulatory management program has centered on its relation to these statutes. Although the real disagreement usually concerns the substance of regulatory policy, much of the debate has occupied the more neutral ground of procedure.[179] In other contexts, administrative lawyers are familiar with this tendency for procedural debate to mask substantive conflict. For purposes of this Article, it creates two difficulties. First, one needs to penetrate the substantive static to identify real issues of procedure. Second, one needs to craft procedures that respond to the potential for tension between statutory requisites and executive preferences.

B. *Delay, Deadlines, and Bargaining Power*

The NAPA Report found that the "clearest impact" of the oversight process has been to delay rulemaking; agency personnel complained about it constantly.[180] Of course, delay is a cost of any analytic process. Whether the cost is justified in a particular case by improvements in the final rule is a matter of opinion. Leaving that question aside, I will discuss three issues. First, in the Reagan oversight program, long delays have been common enough to suggest a need to revise applicable administrative deadline and extension provisions. Second, courts have found delay illegal when it contributes to missing statutory deadlines. And third, delay provides both OMB and the agencies a tool to obtain the other's assent to their views.

Executive Order No. 12,291 sets short presumptive deadlines for OMB review: 60 days for proposed major rules, 30 days for final ones, and 10 days for all others.[181] Most rules are reviewed within these general parameters—the overall figures for 1981-87 show an average of 32 days for major rules, 18 days for others, and 19 days for all rules.[182] In view of OIRA's small staff and large workload, this record is impressive. Still, gross statistics can be misleading for complex or controversial rules. For example, in 1985 the average review time for major EPA rules was 78 days, and for the Department of Labor (where OSHA resides) it was 173 days.[183]

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[170] 467 U.S. at 842.

[171] *Id.* at 843-44.

[172] *Id.* at 865.

[173] *See generally* Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (noting that lower courts have adopted a "strong" *Chevron* approach, deferring to the agency to resolve policy questions); Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986) (discussing the effect of *Chevron*'s two-part standard of judicial review on lower courts).

[174] *E.g.*, Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 381 (1986).

[175] *See* NLRB v. United Food & Commercial Workers Union, 108 S. Ct. 413, 426 (1987) (Scalia, J., concurring); INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1224-25 (1987) (Scalia, J., concurring). *See generally* Starr, *Of Forest and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1988).

[176] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); *see supra* text accompanying notes 129-131.

[177] *See generally* Garland, *supra* note 114; Sunstein, *supra* note 114.

[178] *See, e.g.*, American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) (OSH Act); Union Elec. Co. v. EPA, 427 U.S. 246 (1976) (Clean Air Act).

[179] For an example of mixed legal and policy concerns in the continuing debate, compare Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986) (arguing that OMB's unwarranted dominance over agency rulemaking should be either eliminated by Congress or restricted by the President) with DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (defending President Reagan's regulatory review programs).

[180] NAPA REPORT, *supra* note 120, at 7, 37.

[181] Exec. Order No. 12,291, § 3(e)(2)(A)-(C), 3 C.F.R. 129 (1982), *reprinted in* 5 U.S.C. § 601 note at 431-34 (1982).

[182] 1988-89 REGULATORY PROGRAM, *supra* note 122, at 555.

[183] *Id.* Figures compiled at EPA differ somewhat. They showed that in 1985, OMB held major rules for over four months. OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS, S. REP. No. 156, 99th Cong., 2d Sess. 9 (1986) [hereinafter S. REP. No. 156].

These statistics do not reflect delay stemming from OMB-agency negotiations that precede formulation of a proposed rule.[184] Nor do they reflect the time costs of internal agency review processes that have arisen in response to the Executive Order.[185] Of course, pre-proposal delay may be offset by speedier review later due to agreement on some issues. Indeed, the Executive Order's short presumptive periods for review provide some incentive to shift review to earlier stages of rule formation to avoid extensions. Moreover, as the very existence of Executive Order No. 12,498 reveals, the earlier OMB review occurs, the more likely it is to be effective in molding agency policy.

Executive Order No. 12,291 allows OMB to extend its review indefinitely, absent judicial or statutory deadlines.[186] Controversial rules have been held for periods exceeding one year. For example, EPA submitted eleven New Source Performance Standards (NSPS) for air pollutants to OIRA for review, between three and thirteen months before the applicable statutory deadline for their issuance.[187] Negotiations then extended past the deadline for all eleven rules, in one case by a year. This technical violation of both statutory and executive order requisites may not have seemed serious to either EPA or OIRA because the health and safety statutes contain many rulemaking deadlines that agencies do not meet. Nevertheless, these violations tend to produce hostile reactions in Congress. A congressional oversight report concluded that the NSPS delay was "caused by the need to respond to OMB's questions on cost-effectiveness and to clarify apparent misunderstandings and misinterpretations, by delayed meetings, and by simple inaction and unresponsiveness on the part of OMB."[188]

Review-based delays have also encountered judicial disapproval when they have contributed to an agency's failure to meet statutory deadlines. In *Environmental Defense Fund v. Thomas*,[189] a district court considered a suit to compel EPA to comply with a statutory directive that it promulgate rules dealing with hazardous wastes in underground storage tanks by March 1, 1985. EPA had already failed to meet this deadline when it sent a proposed rule to OMB on March 4, 1985. The agency might have anticipated that the missed deadline would compel speedy OIRA clearance, but that was not to be. In an April meeting, OIRA pressed EPA to alter its strategy from containing all leaks to one of preventing leaks of wastes that risk analysis identified as health threats. After more negotiations, OMB cleared the rule in mid-June.[190]

Finding a statutory violation, the court set a new deadline for promulgation of a final rule, compliance with which was not to be prevented by OMB review.[191] Judge Thomas Flannery noted that the delay problem was not limited to this rule—interrogatories revealed that OMB often extended its review even when statutory or judicial deadlines were present.[192] Complaining that the executive order's exemption for rules under deadline is "[a]pparently . . . simply ignored," he declared that OMB review must terminate in time to allow deadlines to be met.[193]

Especially in the presence of statutory deadlines, either OIRA or an agency can use delay to gain leverage. A typical agency complaint occurred in an internal EPA study of the NSPS delays:

> The problem is that OMB has no incentive whatsoever to keep the process moving and no one to which they are accountable for failures of responsiveness. . . . Once a dialogue has begun, OMB tends to repeatedly find new issues each time the last issue is settled, often with long intervening delays. Often, . . . these issues involve questioning the technical judgment of EPA rather than the implications of costs, benefits, and impacts to society.[194]

EPA is correct that the responsibility for issuing a rule (and, probably, the desire to have one at all) lies principally with the agencies rather than OIRA. Knowledge that the agencies need new rules more than OMB does gives OIRA leverage in any rulemaking. Still, OIRA is accountable within OMB and the administration for its lapses. Any tendency to bring up new issues during review can result from inefficiency in OIRA, and if so can be cured by improved management. Also, it is not easy to identify the borderline between technical judgment and oversight of a rule's costs and benefits.

True, even when delays are long, it is rare for agencies to seek formal appeal of an OIRA position, or to publish a rule in the face of its opposition.[195] An agency contemplating either action would fear worsened relations with OMB and, possibly, retribution. Therefore, delay caused by OIRA preference can put effective pressure on an agency to accede. Moreover, this pressure arises even when delay in

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[184] *See* Olson, *supra* note 148, at 46 (noting that "OMB was involved for over a year" before any EPA proposal emerged on air quality standards for particulates).

[185] *See* G. Bryner, *supra* note 152, at 125 (noting that due to the organizational complexity that has arisen within EPA, progress in the rulemaking process has been stifled).

[186] Executive Order No. 12,291 exempts rules from its process when review would "conflict with deadlines imposed by statute or by judicial order." Exec. Order No. 12,291, § 8(a)(2), 3 C.F.R. 133 (1982), *reprinted in* 5 U.S.C. § 601 note at 431, 434 (1982).

[187] Olson, *supra* note 148, at 68.

[188] S. Rep. No. 156, *supra* note 183, at 31.

[189] 627 F. Supp. 566 (D.D.C. 1986).

[190] *Id.* at 567-69.

[191] *Id.* at 570-71.

[192] *Id.* at 571.

[193] *Id.*

[194] S. Rep. No. 156, *supra* note 183, at xvi (emphasis omitted) (quoting Emission Standards and Eng'g Div., Off. of Air Quality Planning and Standards, Off. of Air, Noise, and Radiation, U.S. EPA, New Source Performance Standards: Beverage Can Industry—A Case Study (Aug. 23, 1983)).

[195] *See supra* text accompanying notes 155-160; *see also* S. Rep. No. 156, *supra* note 183, at 6.

OIRA is not a negotiating tactic but a result of the volume of rules and the small size of its staff.

In addition, OIRA has an incentive to prolong negotiations with an agency rather than to appeal for help from higher levels in OMB and the administration. In the absence of a formal review process within the executive, it is unclear who may appropriately intervene in a dispute. OIRA might reasonably fear that its own relatively technocratic style of review will be displaced by more politically oriented operatives on the White House staff.[196]

In the presence of a statutory or judicial deadline, the possibility arises for either OIRA or an agency to pressure the other in a game of "chicken." Agencies have the formal responsibility to meet deadlines, and are therefore vulnerable to threats of delay. At the same time, agencies can withhold their own submission to OIRA until a deadline nears, and press for immediate review. Indeed, if an agency is tardy enough, it may escape review entirely.[197]

More definite limits should be placed on the duration of OIRA review to constrain the relatively infrequent but extended delays that have sometimes interfered with the administration of federal programs. Such limits would presuppose that the marginal utility of OIRA review diminishes as time passes and as the costs of delay increase. Reasonable minds could disagree on the optimal duration of OMB review. One strategy would begin with the presumptive limits in Executive Order No. 12,291, which have sufficed for most rules.[198] OIRA would be entitled to a set number of extensions each year, again for a fixed and final period.

Firmer administrative deadlines would inform both sides to the dialogue of the time it will end. Of course, agencies would gain opportunities to stall, hoping to prevail through inaction. The existence of OMB's other powers over agencies, especially in budgeting, should confine this tendency somewhat. For a more sensitive enforcement device, OIRA should be granted power to counter agency delay by imposing deadlines for agency responses to its communications. If an agency misses the deadline, the time for OIRA review would increase accordingly. As well, OMB could threaten to comment publicly on the rulemaking record in order to induce an agency to respond to its views.

C. *Allocating Agency Jurisdiction: Asbestos*

The regulation of asbestos has produced a major controversy over the role and limits of OMB oversight. The dispute concerned OMB pressure on EPA to invoke its authority under section 9 of the

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[196] John Cooney, former Deputy General Counsel, OMB, Remarks at the meeting of the ABA Section of Administrative Law and Regulatory Practice, Denver, Colo. (Feb. 5, 1989).

[197] *See* Natural Resources Defense Council, Inc. v. Ruckelshaus, 14 Envtl. L. Rep. (Envtl L. Inst.) 20,817, 20,819 (D.D.C. 1984) (ordering EPA to issue a rule without OMB review because of a violation of statutory deadlines).

[198] *See supra* text accompanying note 181.

Toxic Substances Control Act (TSCA)[199] to defer to the Occupational Safety and Health Administration (OSHA) and the Consumer Product Safety Commission (CPSC) for asbestos regulation. Unlike most instances of OMB oversight, this one involved a question of coordinating action among several agencies having potential jurisdiction.[200]

In 1984, after five years of preparation, EPA sent OIRA two proposed regulations for the control of asbestos.[201] EPA's approach was strict—the rules would have banned four product categories and phased down production of others. For about the next six months, EPA and OIRA sparred over the rules. One prominent dispute concerned valuation of benefits. In accordance with its policy of promoting consistent approaches to cost-benefit analysis, OIRA argued that the health benefits of cancer cases avoided should be discounted for the thirty- to forty-year latency period for asbestos-caused cancer.[202] EPA resisted the discounting approach, noting its consequence of reducing the apparent cost-effectiveness of the rules.[203]

As impasse loomed, OMB began pressing EPA to invoke its section 9 authority, which authorizes it to defer to another agency with jurisdiction over a toxic substance upon a finding that the other agency has power to reduce the risk "to a sufficient extent."[204] EPA had repeatedly rejected the adequacy of such a referral; OIRA now argued that referral was mandatory.

In February, 1985, EPA suddenly announced that it was withdrawing its proposed rules for referral to OSHA and CPSC. The only support for the decision was an OMB legal memorandum urging that referral was mandatory.[205] Enraged EPA staff wrote an open letter to Administrator Thomas, denouncing the deferral as "an insult to our intelligence and the public's."[206] Amid this internal turmoil and after a heated public controversy and hostile congressional hearings, EPA reconsidered its decision. It issued proposed rules in

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[199] 15 U.S.C. § 2608 (1982).

[200] Another jurisdictional dispute concerned the regulation of radioactive wastes. *See* Olson, *supra* note 148, at 64-67. Like the asbestos controversy, it involved a sharp clash between EPA (especially its staff) and OMB. *Id.*

[201] The chronology for this account is drawn from *EPA's Asbestos Regulations: Hearing Before the Subcomm. on Oversight and Investigations of the House Energy and Commerce Comm.*, 99th Cong., 1st Sess. 21-28 (1985), and the SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., EPA'S ASBESTOS REGULATIONS: REPORT ON A CASE STUDY ON OMB INTERFERENCE IN AGENCY RULEMAKING 1-5 (Comm. Print 1985) [hereinafter OMB INTERFERENCE REPORT].

[202] OMB INTERFERENCE REPORT, *supra* note 201, at 25, 78-82; *see supra* text accompanying note 122.

[203] *Id.* at 78.

[204] *See* 15 U.S.C. § 2608(a)(1) (1982).

[205] OMB INTERFERENCE REPORT, *supra* note 201, at 3.

[206] *Id.* at 28.

January, 1986.[207] Some months later, OSHA issued regulations drastically reducing permissible amounts of asbestos in the workplace.[208]

In the asbestos controversy, an agency reversed a considered position under pressure from OIRA without any supporting analysis of its own. OIRA swayed EPA's political appointees from a position for which the staff had prepared extensive support that appeared in the administrative record. The inflamed reaction of the staff to the deferral decision reveals the intellectual and emotional investment that agency personnel develop after years of work on a regulation. The principal officers of an agency are responsible for its decisions, however, and a main purpose of executive review is to ensure that these officers fully consider administration policy. Indeed, the tenor of the staff's reaction in this episode lends support to the perception in OMB that its review can serve to correct a tendency for agency staff, who are devoted to a regulation, to mislead agency heads about the facts or the law.[209] Still, sudden reversals of policy encounter substantial jeopardy from courts exercising today's "hard look" review for arbitrariness.[210]

The notably hostile tone of congressional oversight of this episode might stem partly from a perception that OIRA engaged in some regulatory "forum-shopping," urging EPA to defer only after its intent to pursue stringent regulation became clear. Certainly, OIRA may have acted upon a broader view of the appropriate allocation of jurisdiction to regulate toxic substances. If so, however, the fact that the review process occurs after one agency's rulemaking initiative is well underway can lead to a waste of time and effort. Instituting earlier review of an agency's program pursuant to Executive Order No. 12,498 may ameliorate this problem.

D. *Constraints of the Administrative Record: Ethylene Oxide*

Ethylene oxide is a suspected carcinogen used in the sterilization of hospital instruments. After OSHA had considered its regulation for years, a federal court mandated issuance of a rule by June 15, 1984.[211] As the deadline loomed, OSHA completed work on a final rule, in two parts.[212] There was a permanent exposure limit (PEL) of one part per million (ppm) and a short term exposure limit (STEL) of ten ppm. OSHA's draft preamble to the final rule explained that studies had shown that the PEL alone would not reduce cancer risks to acceptable levels; instead, it reflected the limits of

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[207] 51 Fed. Reg. 3738 (1986).

[208] NAPA REPORT, *supra* note 120, at 5.

[209] *See* Olson, *supra* note 148, at 62.

[210] This is illustrated by the ethylene oxide case, discussed *infra* Part D.

[211] Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1154 & n.12 (D.C. Cir. 1983) (per curiam).

[212] *See* H. SEIDMAN & R. GILMOUR, POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE 142-43 (4th ed. 1986); Brief for the Public Citizen Health Research Group, at 1-27, Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) (No. 84-1252) (providing a chronology of the work on the final rule).

economic feasibility.[213] OSHA also concluded that its STEL would be economically feasible.

On June 13, 1984, OSHA sent the rule to OMB for review. The next day, OIRA Administrator DeMuth responded with a detailed letter objecting that the STEL was insufficiently supported by the health effects data and would not be cost effective.[214] The speed and cogency of this response suggest strongly that OIRA had already negotiated with OSHA concerning the shape of the final rule, before its formal submission for review. The approach of the court's deadline would have compelled such a process if OIRA's review was to be meaningful. The next day, OSHA forwarded its final rule to the Federal Register.[215] In its haste, OSHA simply deleted the STEL and all reference to it from the final standard, and blacked out the portions of the draft preamble referring to support for the STEL. Conceding that this decision was based "largely in response to reservations expressed by the Office of Management and Budget," OSHA then announced further rulemaking proceedings on the issue of a STEL.[216] These proceedings also terminated without promulgation of a STEL.

In *Public Citizen Health Research Group v. Tyson*,[217] the D.C. Circuit upheld the permanent exposure limit, but remanded the STEL portion of the rule to the agency. Without "any evidence" in the record, OSHA now argued that the permanent limit would reduce short-term exposure.[218] Pointing to studies in the administrative record that suggested the contrary conclusion, the court ordered OSHA to promulgate a STEL or explain more persuasively why it would not.[219] A year later, the court declined to hold OSHA in contempt for further delays, but issued an acerbic opinion characterizing the history of ethylene oxide regulation as "one of hesitation

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[213] This preamble language reflected the Supreme Court's holding that "cost-benefit analysis by OSHA is not required by the [OSH Act] because feasibility analysis is." American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 509 (1981).

[214] Letter from Administrator Christopher DeMuth, OIRA to Solicitor Francis Lilly, Department of Labor (June 14, 1984) (copy on file at the *George Washington Law Review*). OIRA also raised questions about OSHA's compliance with Paperwork Reduction Act requirements for clearance of its information collection provisions and about the rule's restrictions on compliance by means other than engineering controls. *Id.*; *see also* 1987-88 REGULATORY PROGRAM *supra* note 128, at xxi (providing additional OMB criticisms of OSHA's approach).

[215] 49 Fed. Reg. 25,734 (1984).

[216] *Id.* at 25,775.

[217] 796 F.2d 1479 (D.C. Cir. 1986).

[218] *Id.* at 1506.

[219] *Id.* at 1507.

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and lack of resolve,"[220] and set yet another deadline for final decision.[221] OSHA finally issued a STEL regulation on April 4, 1988.[222]

In the regulation of ethylene oxide, as with asbestos, an agency suddenly changed a considered position in response to OMB pressure. In both cases, the consequent problem was one of bureaucratic regularity—the agency did not take time to conform its administrative record to the altered outcome of the rulemaking. For asbestos regulation, in which a pure issue of law was involved, the agency's general counsel would ordinarily provide detailed legal advice supporting referral. Although OIRA's legal position in the asbestos controversy may have been correct, OIRA and OMB do not have the staff resources to do more than raise legal questions that the agencies have neglected. In the ethylene oxide rulemaking, OIRA did just that, asking OSHA how its STEL met the Supreme Court's requirement for a "significant risk" finding.[223]

Bureaucratic regularity helps to ensure the legality of agency action. Hasty decisions encounter jeopardy on judicial review. Courts search for signs that issues of fact, policy, and law have been considered carefully. The ethylene oxide case illustrates the potential for sudden policy reversals to fail the dictates of *State Farm*, requiring that agencies show they have taken a "hard look" at policy choices.[224] Thus, even if acceptance of OIRA's position improved the agency's action in each case, the need remained to ensure that the administrative record, including the agency's statement of basis and purpose, fully supported the final outcome. This responsibility lies principally with the agencies, not OIRA. Because government policymaking frequently occurs under time pressure, however, it is important that both parties involved in the review recognize the need to protect the administrative record. Failure to do so risks a judicial remand that is inevitably more burdensome and disruptive than the work needed to ensure legality in the first instance.[225]

E. *Factors Made Relevant by Statute*

In *Center for Science in the Public Interest v. Department of the Treasury*,[226] a consumer health group sued the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (BATF) for rescinding regulations designed to inform consumers, especially those with allergies, of the contents of alcoholic beverages.[227] In 1980, BATF issued a final rule requiring contents labeling, or in the alternative, notification of the availability of a contents list from the manufacturer.[228] BATF had performed a Regulatory Analysis under the Carter administration's Executive Order No. 12,044.[229] The analysis reported wide variations in estimates of both the costs and benefits of the rule. In May, 1981, BATF proposed to rescind the rule, heeding the call of the new Executive Order No. 12,291 to review existing rules under cost-benefit criteria.[230] Finding that the rule's costs were not commensurate with its benefits, BATF then rescinded the rule.[231]

The district court invalidated BATF's action for two reasons. First, it held that Congress had made an implicit cost-benefit judgment by enacting the statute, stating that Congress "did not condition [its] grant of authority with a proviso that the regulations could be withdrawn if the costs to the industry turned out to be too high."[232] Second, the court held that the agency had not explained its sudden shift of policy persuasively enough; the action was arbitrary.[233] As in the ethylene oxide case, the administrative record compiled in support of the initial rule had not been refuted.

In striking down the alcohol labeling regulations, the court did not defer to the agency's interpretation of its statutory duties.[234] The later *Chevron* decision shows that the court's approach, and perhaps its outcome, was wrong. Still, some statutes do preclude a cost-benefit approach. The Alcohol Labeling Act may be one of them.

Even if a statute's text or legislative history shows that Congress expects an agency to promulgate regulations, as with alcohol labeling,[235] an agency may enjoy wide discretion in its choice of regulatory strategy. Therefore, OIRA review is most likely to produce a statutory violation by causing an agency to consider a factor not relevant under the governing statute.[236] The problem is likely to arise as it did in the alcohol labeling case—a court reads a statute to forbid considerations of cost, although that is the focus of the executive order program. Because OMB requires the performance of cost-benefit analysis even when it may not enter the calculus of statutory decision, the potential for a misstep is especially great.[237]

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[220] Public Citizen Health Research Group v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987).

[221] *Id.* at 629.

[222] 53 Fed. Reg. 11,414 (1988).

[223] Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 642 (1980).

[224] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46 (1983); *see supra* text accompanying notes 176-77.

[225] The risk of remand is increased by judicial hostility to "post-hoc rationalizations" for administrative action through litigation affidavits or arguments of counsel. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971).

[226] 573 F. Supp. 1168 (D.D.C. 1983).

[227] The plaintiffs sued under the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-211 (1982). Under section 205(e), alcoholic beverages are to be "labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, . . . as will provide the consumer with adequate information as to the identity and quality of the products."

[228] 27 C.F.R. § 4.32 (1981).

[229] *See supra* text accompanying notes 86-89.

[230] 46 Fed. Reg. 24,963 (1981).

[231] 46 Fed. Reg. 55,093 (1981).

[232] *Center for Science in the Pub. Interest v. Department of the Treasury*, 573 F. Supp. 1168, 1174 (D.D.C. 1983).

[233] *Id.* at 1175-76.

[234] Indeed, the court heightened the intensity of its scrutiny because the case involved "an action which reverses prior policy [rather] than an action setting policy for the first time." *Id.* at 1173. In Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), the Supreme Court subsequently held that the standard of review for recission of a rule is the same as that for rule promulgation. *Id.* at 41-42.

[235] *See Center for Science*, 573 F. Supp. at 1170.

[236] This relevancy requirement stems from Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (stating that a reviewing court must consider whether

Controversy of this sort has arisen repeatedly under other health and safety statutes. Administration of the OSH Act, for which the Supreme Court has forbidden a cost-benefit approach,[238] has produced other disagreements as sharp as the one concerning ethylene oxide.[239] The EPA's setting of National Ambient Air Quality Standards has led to contention with OMB over the permissibility of considering cost.[240] And the FDA's regulation of color additives under the "Delaney Clause," which forbids marketing cancer-causing food additives, has sparked debate over the legality of OMB's suggested "de minimis" exception when cancer risks are low.[241]

Many of these controversies will simmer until the courts either authoritatively construe the governing statutes or defer to executive interpretations under *Chevron*. Even then, charges will arise that impermissible factors have actually affected decisions, notwithstanding denials by OMB and perhaps the agencies as well. In Part VI of this Article, I discuss the potential for public disclosures about the process to allay these concerns.

Contentious relations with congressional committees are likely to continue. As long as Congress continues to be organized by the party not holding the White House, the committees are likely to have a different policy orientation from OIRA. In Congress, policy disagreement with an agency is often cast in terms of the agency's violation of its statute. To mute the criticisms that are framed in legal terms—and to forestall their possible adoption by reviewing courts—agencies and OIRA should strive to buttress their legal stances more thoroughly than they did in the asbestos and alcohol labeling cases.

F. OMB's Statutory Power Over Rules: The Paperwork Reduction Act

Since 1942, the President's budget agency has possessed power to control federal agencies' imposition of paperwork requirements on the public.[242] This function owes its present form to the Paperwork Reduction Act of 1980 (the Act),[243] which created OIRA.[244] The Act recognizes the implications of granting OIRA power over reporting and recordkeeping requirements that are contained in regulations. Information collection is so central to many federal programs that its control can confer de facto power over regulation itself.[245]

The Act adopts a procedural approach to this problem. Copies of proposed rules that include an information collection requirement must be sent to OMB, which has sixty days to file public comments on whether the requirement is "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility."[246] The agency must respond to OMB's comments when it promulgates its final rule. OMB then has sixty days to disapprove the requirement upon a finding that the agency's response was unreasonable.[247] For executive agencies, OMB's action is final; independent agencies, however, may override such disapproval by majority vote.[248]

Within OIRA, administration of the Act is combined with administration of Executive Order No. 12,291. Desk officers review rules of particular agencies, whether or not they contain a paperwork request, under similar criteria: whether the agency action is justified by its benefits and whether burdens have been minimized.[249] There are some procedural differences between the two kinds of review, however. OIRA maintains public files on paperwork matters, which contain the public's comments on submissions. At first, OIRA did not include all correspondence between OMB and the agencies.[250] An amendment to the Act now requires it to do so.[251] As in the

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the decision of an agency was based on the relevant factors set forth in the governing statute). The Court extended this requirement to informal rulemaking in *State Farm*. 463 U.S. at 43; *see supra* text accompanying notes 176-77.

[237] *Regulatory Reform Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 98th Cong., 1st Sess. 981-82 (1983) (providing OIRA's response to questions from the Subcommittee).

[238] American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 540 (1981).

[239] *See, e.g.*, Subcomm. of the House Comm. on Government Operations, Office of Management and Budget Interference with OSHA Rulemaking, H.R. Rep. No. 583, 98th Cong., 1st Sess. (1983) (discussing disagreements over toxic chemical regulations and commercial diving standards).

[240] S. Rep. No. 156, *supra* note 183, at 30.

[241] House Comm. on Government Operations, HHS' Failure to Enforce the Food, Drug, and Cosmetic Act: The Case of Cancer-Causing Color Additives, H.R. Rep. No. 151, 99th Cong., 1st Sess. 11-12 (1985) [hereinafter H.R. Rep. No. 151].

[242] Federal Reports Act of 1942, Pub. L. No. 77-831, 56 Stat. 1078.

[243] Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501-3520 (1982)).

[244] *See supra* text accompanying notes 92-93.

[245] 44 U.S.C. § 3518(e) says, however, that nothing in the Act "shall be interpreted as increasing or decreasing the authority of the President [or] the Office of Management and Budget . . . with respect to the substantive policies and programs of . . . agencies." *See* S. Rep. No. 930, *supra* note 93, at 56.

[246] 44 U.S.C. §§ 3504(h), 3508. OMB has issued new regulations requiring that agency submissions provide more information to the public, such as estimates of the burden imposed by the reporting requirement. *See* 53 Fed. Reg. 16,618 (1988) (amending 5 C.F.R. pt. 1320).

[247] 44 U.S.C. § 3504(h).

[248] *Id.* §§ 3504(h)(7), 3507(c). Under section 3504(h)(9), "[t]here shall be no judicial review of any kind of the Director's decision to approve or not to act upon" a requirement.

[249] *See* Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 88-91 (1987). OIRA has developed a handbook to guide desk officers in implementing the Act. *See* OIRA, Information Collection Review Handbook (draft ed. Sept., 1988) (copy on file with author).

[250] Funk, *supra* note 249, at 92.

[251] 44 U.S.C. § 3507(h) (Supp. IV 1986); *see* 53 Fed. Reg. 16,618, 16,620-21 (1988)

executive order program, there is much oral communication with the agencies that is not reflected in the public record.[252] OIRA places an explanation for paperwork disapprovals in the public file along with any separate letter to the agency that states the rationale in greater detail.[253]

In *United Steelworkers v. Pendergrass*,[254] the Third Circuit considered the Act's scope. The case concerned OSHA's rule requiring employers to warn workers of potentially hazardous materials in the workplace.[255] OIRA disapproved requirements for exchange of chemical manufacturers' disclosure sheets at multi-employer worksites, and also disapproved certain exemptions from duplicative labeling requirements. The court held that the Act's reference to "information collection requests" did not include requirements that information be provided by industry to the public, as distinguished from requirements that information be furnished to the government.[256]

In dicta, the court also stressed the Act's disclaimer of intent to increase OMB's authority over substantive policy decisions delegated to agencies.[257] Although the court's holding provides a relatively clear limit to OIRA authority, its concern over indirect effects on policy suggests that OIRA and the courts may struggle over the relationship between paperwork functions and cost-benefit review.

The executive order processes tend to displace the Act's formal ones because of timing.[258] Because OIRA reviews rules before they are formally proposed or issued, its negotiation with agencies can and does concern both substantive and paperwork matters, leaving little for the Act's post-notice process. This procedure suggests that the executive order may give OMB as much leverage as it can usefully employ. Neither the working relationships between the agencies and OMB nor the overall rate of rejection of agency proposals seem to differ sharply under the two programs.[259] This is not really surprising. To the extent that paperwork requirements mirror the rules they enforce, they should evoke the same OMB reactions as do the rules. And the limits of OMB's peremptory behavior may be set more by such bureaucratic imponderables as general relationships with the agency head than by the existence of formal statutory power.

(to be codified at 5 C.F.R. pt. 1320). There is an exception to this requirement for classified material. 44 U.S.C. § 3507(h).

[252] Olson, *supra* note 148, at 55-59.

[253] *See* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., OMB REVIEW OF CDC RESEARCH: IMPACT OF THE PAPERWORK REDUCTION ACT 24, 32-37 (Comm. Print 1986).

[254] 855 F.2d 108 (3d Cir. 1988).

[255] *Id.* at 110.

[256] *Id.* at 112-13. Thus, the court implicitly determined either that the Act's ban on judicial review of paperwork approvals does not bar review of disapprovals or that a disapproval must be of paperwork within the Act's scope to be shielded from review. *See* Funk, *supra* note 249, at 79-80.

[257] 855 F.2d at 111-13.

[258] Funk, *supra* note 249, at 94-95.

[259] *Id.* at 99-103.

G. *Judicial Review of Executive Order Requirements*

Executive Order No. 12,291 attempts to foreclose judicial review of agency compliance with its requirements. It provides that the order "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law."[260] In other executive order programs, courts have declined to allow private parties to force agency compliance with presidential mandates. For example, in *In re Surface Mining Regulation Litigation*,[261] the court considered a challenge to regulations that was based partly on the agency's asserted failure to prepare an inflation impact statement in accordance with Executive Order No. 11,821.[262] The court agreed with an earlier decision that the executive order "was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action."[263] Accordingly, it would not review agency compliance with the order.

The court's approach in *Surface Mining* was quite conclusory, perhaps because it is very unlikely that the President can confer or remove federal court jurisdiction by executive order. Yet it seems appropriate for courts to recognize a President's wishes about the consequences of his own programs, at least as a matter of comity. Here a careful distinction must be made. Of course, courts must inquire whether a regulation is justified on the administrative record. They may consider materials placed in the record pursuant to executive oversight, such as regulatory analyses, as part of the overall question of the validity of the rule. To date, that is what they have done.[264] But it is quite another thing to consider separately whether the agency has complied with an executive order's requirements, and to reverse its action if it has not.

The burdens of separate litigation over agency compliance with an order would exceed their benefits. Under executive order programs lacking central enforcement provisions (such as Executive Order No. 11,821), agency noncompliance was frequent enough to tempt private parties and courts to perform a task that the executive could do for itself. As experience under Executive Order No.

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[260] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note at 431, 434 (1982).

[261] 627 F.2d 1346 (D.C. Cir. 1980).

[262] Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975), *as amended by* Exec. Order No. 11,949, 3 C.F.R. 161 (1977), *reprinted in* 12 U.S.C. § 1904 note at 592-93 (1976).

[263] 627 F.2d at 1357 (quoting Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976)).

[264] McGarity, *supra* note 118, at 1318-30.

12,291 has amply demonstrated, however, OIRA can deal with recalcitrant agencies.[265] The histories of asbestos and ethylene oxide regulation do not portray an executive in need of outside aid.

VI. *The Openness of OMB Oversight*

The extent to which OMB oversight of federal rulemaking is openly reflected in an agency's administrative record raises two legal issues. Both are clouded by uncertainty and debate. First, to what extent are unrecorded "ex parte" contacts permissible in rulemaking? Second, does the President's constitutional executive privilege extend to OIRA's discussions with agencies about their rules? Obviously, these issues are related. They have produced a wealth of analysis, if not agreement.[266] Much of the commentary mixes law and policy, often without clearly distinguishing between them. I will try to identify the law/policy border in the following discussion.

Neither the Administrative Procedure Act (APA)[267] nor the Due Process Clause provides a general bar to ex parte contacts in rulemaking,[268] although some statutes limit them for particular programs.[269] Courts reviewing rules have struggled with two rather inconsistent directives from the Supreme Court, and have consequently produced a confused body of case law.[270] In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[271] the Court held that courts may not compel agencies to follow procedures that are not required by statute or by due process.[272] *State Farm* emphasized, however, that an agency's administrative record must provide full substantive justification for its policy choices.[273]

The application of these competing considerations to ex parte contacts within the executive branch was ably analyzed in *Sierra Club v. Costle*:[274]

> The purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact . . . in this informal rulemaking setting. After all, any rule issued here with or without White House assistance must have the requisite *factual support* in the rulemaking record . . . . The courts will monitor all this, but they need not be omniscient to perform their role effectively. Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.[275]

Reflecting a similar analysis, the Administrative Conference[276] has recommended that rulemakers "should be free to receive written or oral policy advice" from elsewhere in the executive branch, "without having a duty to place these intragovernmental communications in the public file of the rulemaking," unless they contain "material factual information (as distinct from indications of governmental policy)."[277]

A. *The Problem of Conduit Communications*

OIRA review can provide a "conduit" by which the views of interested private persons reach an agency, without submission to the publicly available record of a rulemaking. These communications pose two kinds of problems. First, they may include new factual information or policy arguments which escape the testing process to which other material in the agency's possession is subjected by public comment. Second, due to their endorsement by OMB, they may assume special prominence in the agency's analysis, risking unfairness to those interested persons who do not enjoy the same access. These concerns for the integrity of the administrative record and for fairness to the public sound partly in law and partly in policy. They have resulted in a recommendation by the Administrative Conference that all conduit communications be revealed in the public record of a rulemaking.[278]

Soon after issuance of Executive Order No. 12,291, the Department of Justice's Office of Legal Counsel (OLC) advised OMB regarding ex parte contacts with agencies:

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[265] For arguments in favor of limited judicial review, see Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 Duke L.J. 285, 344-51; Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 659, 681-86 (1987).

[266] *See generally Symposium on Presidential Control of Rulemaking*, 56 Tul. L. Rev. 811 (1982); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 943 (1980).

[267] 5 U.S.C. §§ 551-561, 701-706 (1982 & Supp. IV 1986).

[268] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542 & n.16 (1978); Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. Chi. L. Rev. 201 (1981).

[269] *E.g.*, Clean Air Act, 42 U.S.C. § 7607 (1982).

[270] *See generally* G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 367-84 (3d ed. 1986).

[271] 435 U.S. 519 (1978).

[272] *Id.* at 542; *see* Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 Harv. L. Rev. 1805 (1978).

[273] 463 U.S. 29, 56-57 (1983).

[274] 657 F.2d 298 (D.C. Cir. 1981)

[275] *Id.* at 407-08.

[276] The Administrative Conference of the United States is a federal agency that formulates recommendations to improve the procedures of the agencies. 5 U.S.C. §§ 571-576 (1982 & Supp. IV 1986).

[277] 1 C.F.R. § 305.80-6 (1988).

[278] *Id.*

> You and your staff may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public.
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> . . .
>
> . . . [R]ulemaking agencies should disclose in the administrative file . . . substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of executive or independent agencies.
>
> . . .
>
> Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process.[279]

Thus, OLC's advice followed the emerging consensus among administrative lawyers regarding ex parte contacts. OMB adopted it, but not completely. In a memorandum instructing agencies on procedures under the new executive order, OMB stressed that "[b]oth the public and the agencies should understand that the primary forum for receiving factual communications concerning proposed rules is the agency."[280] Therefore, factual materials sent to OMB were also to be sent to the agencies for inclusion in the record, and OMB promised to identify as "appropriate for the whole record of the agency rulemaking" any factual material that it developed or received and then transmitted to an agency.[281] Omitted from this formulation was policy material received from outside the government. OMB would soon encounter substantial controversy concerning its use.

A number of health and safety rulemakings during the Reagan administration have produced complaints about conduit communications. Congressional committees overseeing the programs proved sympathetic to these complaints, and brought increasing pressure on OIRA to alter its procedures. OIRA has consistently denied that it has served as a conduit.[282] Especially in the early years of the executive order program, however, OMB engaged in many meetings and informal contacts with interested persons, most of whom represented regulated industries.[283] Because of OMB's heavy workload, this practice created risks that new factual material would reach agencies without identification by OMB, that policy positions

of outsiders would be accepted uncritically by OMB, and that the process would display a bias toward industry. Charges arose that all three of these effects were present.[284]

EPA provided one primary field of controversy. In the asbestos rulemaking, it was charged that there were about twenty communications (letters, meetings, and telephone calls) between OIRA and the asbestos industry and other interested persons.[285] A committee thought that legal and policy arguments that OIRA sent to EPA "closely track[ed] arguments made . . . by the Asbestos Information Association in a letter to OMB."[286] OMB denies having had meetings or telephone conversations with industry representatives, and insists that its positions were developed independently and were later adopted by the industry.[287] There were meetings at OMB, but they were with representatives of the Canadian government and the Interior Department.

In OSHA's ethylene oxide rulemaking, a committee concluded that OMB arguments against the short-term exposure limit "apparently repeat[ed] industry arguments which had already been rejected by OSHA."[288] One House report found that OMB met with industry representatives regarding at least two other OSHA rulemakings.[289] A second report found that the FDA's rulemaking on carcinogenic color additives resulted in industry letters to and meetings with OIRA, which then repeated industry arguments to the FDA.[290]

Several features of these cases probably helped to exacerbate relationships with the congressional oversight committees, whose reports developed a notably hostile tone. First, partisan politics

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[279] Contacts Between the Office of Management and Budget and Executive Branch Agencies Under Executive Order No. 12,291 (Apr. 24, 1981), *reprinted in* 5 Op. Off. Legal Counsel 107, 110-12 (1981).

[280] Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies, Subject: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation" (June 11, 1981), *reprinted in* 1988-89 REGULATORY PROGRAM, *supra* note 122, app. III at 540.

[281] *Id.*

[282] *See, e.g.*, Olson, *supra* note 148, at 55 n.281.

[283] *Id.* at 55-62, 69-71; *Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 58-61 (1981) (providing an OMB list of 36 meetings in early 1981, 33 of them with industry representatives).

[284] SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY, REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM, AND OTHER MATTERS 282-94 (Comm. Print 1984).

[285] *EPA's Asbestos Regulations: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 231-37 (1985); *see also* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., EPA'S ASBESTOS REGULATIONS: REPORT ON A CASE STUDY ON OMB INTERFERENCE IN AGENCY RULEMAKING 103 (Comm. Print 1985) (noting more than 30 ex parte communications by EPA and OMB officials).

[286] S. REP. No. 156, *supra* note 102, at 15, 24-25. In another rulemaking, on water pollutant guidelines, it seemed to EPA's Chief of Staff that comments from OMB "were of such a particularized technical nature . . . in an engineering sense, that they would have had to have come from someone other than the staff of OMB itself." *Superfund Hearings*, *supra* note 157, pt. 3, at 5 (statement of former EPA Chief of Staff John Daniel).

[287] OMB posits that the accusations of industry contacts came from the presence in OMB files of papers from the public docket of the agency.

[288] S. REP. No. 156, *supra* note 102, at 32.

[289] H.R. REP. No. 583, 98th Cong., 1st Sess. 11 (1983).

[290] H.R. REP. No. 151, *supra* note 241, at 59-62.

undoubtedly played a role, as the administration and the committees squabbled over the direction regulatory policy should take. Second, in rulemaking it is often difficult to separate fact from policy, so OMB may have appeared to be violating its own rules—or, indeed, it may have done so. Third, the administration's emphasis on regulatory relief and the frequency of its contacts with industry groups opened OMB to portrayal as a special pleader for industry, instead of a critic prepared to see both the costs and benefits of regulation.

B. *Conflict and Compromise: The Evolution of OMB's Disclosure Policy*

By 1986, OMB was under serious pressure from both Houses of Congress. The Chairmen of three important House committees joined in an effort to deny OIRA any appropriations until limits to its powers were enacted.[291] In the Senate, members of the Committee on Governmental Affairs pressed OMB to open its processes.[292] OMB wanted to obtain reauthorization of the Paperwork Reduction Act and to stop the "defunding" move in the House. In June, 1986, OIRA Administrator Gramm issued a memorandum announcing new disclosure procedures.[293] There were two antecedents for these procedures: a Senate amendment to a paperwork reauthorization bill in 1984,[294] which failed to pass, and a special agreement OMB reached with EPA in 1985 for review of its rules.[295]

Under the 1986 procedures, OIRA makes available copies of draft notices of proposed rulemaking and final rules that are submitted for review, along with copies of all related correspondence between OIRA and agency heads.[296] These documents are available once the notices or final rules have been published in the Federal Register. Similarly, OIRA provides on request copies of agency submissions under Executive Order No. 12,498, following publication of the final Regulatory Program.[297]

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[291] They were Chairman Dingell of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, Chairman Brooks of the Government Operations Committee, and Chairman Whitten of the Appropriations Committee.

[292] Senators Durenberger and Levin led the effort. *See Oversight of the Office of Management and Budget Regulatory Review and Planning Process: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 56-58, 97-98 (1986).

[293] OMB, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498, Subject: Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 (June 13, 1986) [hereinafter June 13, 1986 Memo] (rev. Aug. 8, 1986), *reprinted in* 1988-89 REGULATORY PROGRAMS, *supra* note 122, app. III, at 529-31.

[294] SENATE COMM. ON GOVERNMENTAL AFFAIRS, PAPERWORK REDUCTION ACT AMENDMENTS OF 1984, S. REP. No. 576, 98th Cong., 2d Sess. 21-23, 35 (1984).

[295] Letter from Robert P. Bedell, Deputy Administrator, OIRA, to A. James Barnes, Deputy Administrator, EPA (May 30, 1985), *reprinted in* 1988-89 REGULATORY PROGRAM, *supra* note 122, app. III at 542-43.

[296] June 13, 1986 Memo, *supra* note 293. Also now available are drafts of advance notices of proposed rulemaking, and lists, at the end of each month, of all notices and final rules for which OMB has completed review. *Id.*

[297] *Id.*

OIRA also agreed to stricter controls on "conduit" communications from persons outside the federal government. For these added controls OIRA referred to its earlier procedures for EPA, along with an offer to extend them to any other agency so requesting.[298] OIRA sends these agencies copies of all written material from outsiders, advises them of all oral communications,[299] and invites agency personnel to attend meetings concerning their rules.[300] It also makes available in its public reading room written materials and lists of meetings and communications involving persons outside the federal government.

These procedures have removed some, but not all, of the controversy over the openness of OMB review.[301] For review under Executive Order No. 12,291,[302] the significant gaps in disclosure are: (1) the absence of draft notices and rules that are withdrawn by the agency and never issued; (2) the absence of correspondence between OIRA desk officers and subordinate agency personnel; and (3) the absence of summaries of oral communications between OIRA and the agencies.

C. *The Scope of Executive Privilege*

Analysis of the appropriate degree of openness of OMB review of rulemaking must consider the role of executive privilege, which may provide a constitutional bar to some measures. Two Supreme Court cases have shed some light on the problem. In *United States v. Nixon*,[303] the Court recognized a constitutional executive privilege based on the President's need for confidential policy deliberations.[304] The privilege was qualified, however,[305] and in *Nixon* itself was overridden by the need of the courts for evidence in a criminal case.[306]

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[298] These agencies now include the Departments of Housing and Urban Development, Labor, Transportation, and the Treasury. *Id.* at 15.

[299] The practice regarding oral communications is short of logging, in the sense of a summary of the substance of a conversation. Instead, notice is given of the source and subject matter of each conversation.

[300] Since 1981, OIRA has allowed only the Administrator and Deputy Administrator to "meet or discuss a rule under Executive Order 12,291 review," with persons outside the executive branch unless others are specially authorized. 1988-89 REGULATORY PROGRAM, *supra* note 122, at 15 n.21. This limit has been blurred somewhat, however, by the opportunity for OIRA staff to meet with outsiders on paperwork requirement reviews. *See* Olson, *supra* note 148, at 62-64.

[301] The 1986 procedures parallel earlier recommendations of the Administrative Law Section of the American Bar Association. *See* Strauss & Sunstein, *supra* note 101, at 193, 207 (urging OMB to make agency drafts prepared under Executive Order Nos. 12,291 and 12,498 available to relevant congressional committees after the rulemaking activity is complete). The Administrative Conference subsequently adopted a recommendation closely resembling the 1986 procedures, modifying its earlier stance discussed *supra*, text accompanying notes 276-77. *See* 54 Fed. Reg. 5207 (1989).

[302] For matters concerning Executive Order No. 12,498, see *infra* text accompanying notes 331-37.

[303] 418 U.S. 683 (1974). *See generally Symposium: United States v. Nixon*, 22 UCLA L. REV. 1 (1974).

The Court's use of a functional, balancing approach was repeated in *Nixon v. Administrator of General Services*,[307] in which the Court upheld the power of Congress to regulate presidential papers. From a separation of powers standpoint, the Court said,

> the proper inquiry focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[308]

The Court found that the activities of records archivists would cause only a limited intrusion on confidentiality, and were therefore justified by congressional needs to preserve history. It pointed out that confidentiality is a wasting asset subject to erosion by the creation of presidential libraries, the memoirs of participants, and the efforts of historians.[309]

Congress has been of two minds about executive confidentiality. On the one hand, it has entirely exempted the President and his immediate staff from the Freedom of Information Act (FOIA),[310] and has provided an exemption from forced disclosure for deliberative materials generated elsewhere in the executive branch.[311] Accordingly, in *Wolfe v. Department of Health and Human Services*,[312] the D.C. Circuit held that FOIA exempts from disclosure material in a "regulations log" that HHS used to indicate which FDA proposals were being reviewed by HHS or OMB.[313] On the other hand, Congress has repeatedly sought to override claims of executive privilege in order to obtain material in the hands of the executive for its own use.[314] Courts have not announced any clear rules for these congressional-executive contests over information,[315] and it is often difficult to litigate them at all.[316] Consequently, informal negotiation and struggle dominate, with congressional committees obtaining most information they desire if they are persistent enough and enjoy the support of their house of Congress.[317]

Thus, it would not reflect actual government practice to argue that the executive branch possesses a nonwaivable executive privilege for all deliberative material it generates. The executive has sometimes made such claims as a tactic in contests over information, yet it often releases such materials to congressional committees or to members of the public. Indeed, the 1986 compromise between OIRA and its oversight committees is one example of the contingent nature of executive confidentiality as it actually operates.

The executive branch has, however, two strong claims for confidentiality. First, deliberations between the President and his immediate advisers (which were involved in *Nixon* itself) implicate the President's ability to perform his constitutional functions, and deserve a strong presumption of confidentiality. Thus, if the President or his immediate advisers wish to discuss regulatory policy with an agency head, their conversations need not reach the administrative record.[318] This privilege does not necessarily mean, however, that communications between OIRA and agencies deserve the same treatment.[319]

Second, throughout the executive branch there is an essentially unvarying interest in protecting policy discussion while a decision is under consideration, as opposed to after the fact. This is not a matter of encouraging candid advice, which needs long-term protection to flourish. Instead, it is a matter of power over the policy decision itself. When deliberation on a pending decision is open, it is very hard to limit the lobbying of every interested person and to control the situation. With these considerations in mind, I now turn to specifics on the openness of OMB oversight.

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[304] 418 U.S. at 703-16.

[305] *See id.* at 706 (refusing to sustain an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances").

[306] *Id.* at 713.

[307] 433 U.S. 425 (1977).

[308] *Id.* at 443 (citation omitted).

[309] *Id.* at 450-51, 454. The Court observed that most materials in presidential libraries are open, with lessening restrictions over time. *Id.* at 450 n.12. The Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2207 (1982 & Supp. III 1986), restricts access to the President's deliberations with his advisers for not more than 12 years. *Id.* § 2204(a) (1982); *see also Presidential Records Act of 1978: Hearings on H.R. 10998 and Related Bills Before the Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 88 (1978) (providing testimony by the Department of Justice in support of the constitutionality of the Act).

[310] Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (stating that FOIA's legislative history unambiguously indicates that Congress intended that the President and his immediate staff whose sole function is to "advise and assist" him be exempt from FOIA).

[311] 5 U.S.C. § 552(b)(5) (1982); *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

[312] 839 F.2d 768 (D.C. Cir. 1988) (en banc).

[313] *Id.* at 771.

[314] *See generally* Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974) (providing a discussion of executive privilege); Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987) (same).

[315] United States v. American Tel. & Tel. Co., 567 F.2d 121, 128-29 (D.C. Cir. 1977) (concluding that a congressional-executive impasse requires a "judicial balancing of executive and legislative interests").

[316] *See, e.g.*, United States v. House of Representatives, 556 F. Supp. 150, 152-53 (D.D.C. 1983) (dismissing as nonjusticiable a suit for declaratory judgment brought by the executive branch to compel disclosure of certain documents by EPA Administrator Anne Gorsuch).

[317] See P. SHANE & H. BRUFF, THE LAW OF PRESIDENTIAL POWER 187-208 (1988), for case studies that support this proposition.

[318] Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981).

[319] *See infra* notes 323-30 and accompanying text.

D. *Protecting the Administrative Record: A Paper Trail Or A Logging Requirement?*

Regulatory oversight evolved substantially during the Reagan administration. The NAPA Report concluded that "while it appeared originally to respond to the demands of regulated industries for regulatory relief and to operate with little public and congressional scrutiny, it is now more open and restrained."[320] NAPA called for even more openness, recommending that agencies "log, summarize, and include in the rulemaking record all communications from outside parties, OMB, or other executive or legislative branch officials concerning the merits of proposed regulations."[321]

NAPA's approach is not the only acceptable one.[322] Any particular disclosure feature should be judged by its marginal contribution to the values served by openness, weighed against its marginal burdens and its interference with the values served by confidentiality. I proceed by analyzing increasing levels of disclosure.

The 1986 compromise between OMB and the committees produces a "paper trail" of oversight activity. Those interested can track the written portions of OMB's activity to check its wisdom and legality. Knowing that this trail is being left, those within OIRA and the agencies can be expected to ensure that their interchange is within legal limits. Presumably, however, candor suffers somewhat. The effects are both good and bad. Pressure to ignore the administrative record or statutory limits might be less likely to occur when information must be delivered orally, and to that extent furtively. On the other hand, written advice may be crafted for the public eye, with more posturing and less incisiveness.

Less than this amount of disclosure does not seem desirable. In the early years of the Reagan administration's program, charges frequently arose that OMB was pressing an agency beyond the parameters justified by its statute or its administrative record. Under the pressure of congressional investigation, a paper trail of each controversial rulemaking emerged to allow resolution of the dispute. This pattern of inquiry and eventual disclosure, with its heavy transaction costs for all concerned, is likely to recur unless a paper trail is routinely provided. Similarly, the new controls on conduit communications seem necessary to ensure the fairness of executive oversight.

The 1986 compromise does not, however, produce a complete paper trail. One omitted category is notices and rules that are withdrawn by an agency. Adding these items would not pose much added burden for the agencies and OMB. Indeed, the availability of submissions for the Regulatory Program pursuant to Executive Order No. 12,498, whether or not the initiative matures in a notice of proposed rulemaking, shows that such an addition would be feasible.

The 1986 compromise also does not reveal correspondence among subordinate personnel, for example memoranda exchanged by desk officers and agency staff, although congressional inquiries or leaks often reveal them. The routine availability of these items would materially aid understanding of the oversight process, only a portion of which appears in formal written communications between the Administrator of OIRA and agency heads. Also, pressure to ignore an agency's statute or administrative record can occur at any level of the process. On the other hand, revealing staff dialogue might blur political accountability within both OIRA and the agencies by inviting observers to wonder who speaks for the institution, the staff or the political appointee at the top. Knowing their correspondence would be made public, staff could try to bind their superiors by taking strong positions in print. On balance, I think this material should be available, although the issue is close.

Another possible modification of the 1986 procedures would be to require agency drafts to be published in the Federal Register simultaneously with their submission to OMB. I think it better to make the drafts available only after the rulemaking notices have been published. Publicity about the pendency of review can only increase pressure on OIRA to engage in communications with interested persons. Instead, rulemaking procedure should be structured to guide persons outside the government to the agency, not to OIRA.

Whether oral communications should be "logged" (summarized and placed in the public record) presents another close question.[323] Longstanding dispute over this procedure has made the arguments familiar. The traditional conception of rulemaking as an informal, "quasi-legislative" activity has made unrecorded ex parte contacts seem permissible. Congress has declined to amend the APA to alter that view.[324] Moreover, an agency must defend its rules in court

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[320] NAPA Report, *supra* note 120, at 7.

[321] *Id.* at 35. NAPA explained:

> Just as agency decisionmaking can be improved by subjecting it to external scrutiny, so can OMB's analyses of agency proposals benefit from outside review. The same arguments used to justify OMB review itself—that agencies need to articulate formally what they are doing and why their actions are appropriate—apply equally to OMB.

Id. In his separate views, Richard Wegman called for placing any centralized control early in the rulemaking process. If it occurs during the comment period or before, he argued, the public can react to it. He would avoid all post-comment period involvement as too productive of "political mischief." *Id.* at 44.

[322] For a similar approach, see S. 2023, 99th Cong., 2d Sess. (1986) (providing for the establishment of a file concerning the review of rules by the President).

[323] *See* Gellhorn & Robinson, *supra* note 270, at 205 (noting the difficulty in articulating guidelines for ex parte contacts and impartiality); Verkuil, *supra* note 266, at 989 (concluding that the need for a record should not override other interests such as presidential coordination and policymaking).

[324] Action for Children's Television v. FCC, 564 F.2d 458, 474-75 & n.28 (D.C. Cir. 1977). The D.C. Circuit noted that

> [i]f Congress wanted to forbid or limit *ex parte* contact in every case of informal rulemaking, it certainly had a perfect opportunity of doing so when it

solely on the basis of the public record, and may not rely on facts or policy argument not reflected there.[325]

The NAPA Report finds these considerations outweighed by improvements that disclosure will bring to the oversight dialogue.[326] Certainly, OMB pressure to ignore the administrative record or the statute can be applied as easily by voice as by pen. Yet that pressure can occur anyway, at higher levels of the executive branch, in ways that are difficult or impossible to police. For detailed policy argument, there may be no practical alternative to writing. Moreover, agencies can request that policy advice on a particular matter be transmitted in writing whenever the content of oral advice appears to merit that check. A strict logging requirement in OIRA could simply shift oral discussion up the organization chart, or into the early rulemaking stages to which logging requirements generally do not apply.

Logging all oral communications would add a significant burden to administration. More important, it would alter the relationship between OMB and the agencies in some undesirable ways. The very presence of an executive privilege concept recognizes a positive value in informal discussion. Policy debate tends to feature negotiation and compromise, as the history of OMB oversight illustrates. Negotiation is not a flower that blooms in sunlight. Therefore, there is reason to maintain an informal, oral channel of communication between agencies and OIRA, even if more detailed, formal communication that is written down is available to the public.

The Administrative Conference has recommended that official written policy guidance to agencies from OIRA be placed in the public file of the rulemaking after the notice to which it pertains is issued.[327] I would add other written communications between OIRA and the agencies. Written or oral policy advice from the President or his immediate advisors[328] to agencies need not be disclosed, however, so that the constitutional executive privilege can

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> enacted the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 . . . . That it did not extend the *ex parte* contact provisions of amended section 557 [which governs adjudication] to section 553 [which governs rulemaking]—even though such an extension was urged upon it during the hearing—is a sound indication that Congress still does not favor a per se prohibition or even a "logging" requirement in all such proceedings.

Id. at 475 n.28.

[325] *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (stating that the courts may not accept post-hoc rationalizations to support agency action).

[326] NAPA REPORT, *supra* note 120, at 35.

[327] 54 Fed. Reg. 5207, 5208 (1989); *see supra* note 301.

[328] A workable definition of this group is the exemption to FOIA discussed *supra* note 310 and accompanying text.

operate.[329] And at least for the present, a universal logging requirement seems premature.[330]

E. *Executive Order No. 12,498 and the Planning Process*

At the start of its second term, the Reagan administration reached earlier into the rulemaking process with Executive Order No. 12,498.[331] The order requires the head of each executive agency to send OMB a "draft regulatory program" that describes "all significant regulatory actions" to be undertaken within the next year.[332] OMB reviews the plan for consistency with administration policy, and a final Regulatory Program is published.[333] As noted above, the order's purpose is to give political appointees in OMB and the agencies more control over the early stages of rulemaking.[334]

OMB's definition of the significant regulatory actions to which the order applies is broad. It includes the creation of an agency task force to evaluate the need for a regulation, the undertaking of studies of economic problems, and an analysis of health and safety risks that might lead to regulation.[335] Consequently, immediate criticism arose that the order would stifle investigative activity that would have shown the need for regulation.[336]

OMB's 1986 disclosure policy included a promise to make available all agency drafts submitted to OMB under the order, after publication of the year's Regulatory Program.[337] Without the availability of the drafts, public and congressional monitoring of OMB's activity would have been extremely difficult. This aspect of the disclosure policy should be continued. Correspondence between OMB and the agencies, or from persons outside the government, should also be made available. But oral communications between OMB and the agencies should remain confidential, as they traditionally have been at these early stages of the rulemaking process. The purpose of partial disclosure under this executive order differs, however, from that under Executive Order No. 12,291. Oversight occurring very early in the rulemaking process is not likely to pose an identifiable threat of a statutory violation, unless a statute unequivocally calls for regulation. Nor is it likely to undermine a developed administrative record. Instead, the purpose is more political, to reveal the road not taken. The interested public and congressional committees can then decide whether to press for a different course.

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[329] The Administrative Conference would extend this privilege generally to "other members of the Executive Branch," 54 Fed. Reg. 5207, 5208 (1989), which would subject only OIRA's written advice to disclosure. I would treat written interagency advice that does not emanate from the President's immediate office similarily to OIRA's.

[330] My views were once to the contrary. *See* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 504-06 (1979).

[331] Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C.A. § 601 app. at 296-97 (West Supp. 1988).

[332] *Id.*

[333] *See generally* Note, *supra* note 100.

[334] *See supra* text accompanying notes 100-101; *see also* DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (providing views of two former OIRA administrators).

[335] OMB, Bulletin 85-9 & Attachment 1 (Jan. 10, 1985).

[336] *See* S. REP. No. 156, *supra* note 102, at 10-12; Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1063 (1986).

[337] 1988-89 REGULATORY PROGRAM, *supra* note 122, at x n.14.

VII. Defining Exceptions to OMB Oversight

A. Independent Agencies and Excepted Functions

To date, Presidents have not attempted to apply their regulatory management executive orders to the independent agencies. Although President Reagan was advised that he had the constitutional power to include these agencies in the coverage of Executive Order No. 12,291, he chose not to do so.[338] The extent of a President's constitutional power over an agency that Congress has chosen to shield from his supervision has been a matter of spirited, if inconclusive, debate for many years.[339]

The Supreme Court has recently given the debate new life. *Morrison v. Olson*[340] announced a new test for the constitutionality of restrictions on the President's power to remove executive officers: whether the statutes "impede the President's ability to perform his constitutional duty."[341] This test is surely better than the old one—whether an office is "purely executive"[342]—with its invitation to bright lines where the reality of government offers none. Nevertheless, it states but does not answer the central question: What is the nature of the President's constitutional duty?[343] A narrow definition might include only the substantive grants of power over foreign affairs and national defense in Article II, and would therefore confer little supervisory power over rulemaking. A broad definition might emphasize the President's duty to take care that the laws be faithfully executed, and would envision broad supervisory power.

Some guidance emerges from the Court's holding in *Morrison*, and from a distinction it made. The Court upheld independence where conflicts of interest undermine normal political accountability, as in the investigation and prosecution of high-level crime in the executive branch.[344] Ordinary regulation does not pose this problem. Thus the Court cautioned that special prosecutors do not enjoy "policymaking or significant administrative authority."[345] This statement implies a broad view of presidential power—that placing policymaking responsibilities in independent agencies infringes the President's powers by undermining political accountability. Of course, the Court left that question for another day.[346]

Any functional, balancing doctrine is uncertain in application. Nevertheless, the President has a substantial argument that his need to supervise most regulation of the traditional independent agencies is no less than for the executive agencies. Much of the policymaking of the independent agencies is not functionally distinct from that of executive branch agencies. For example, the Federal Trade Commission, an independent agency, shares antitrust enforcement responsibility with the Department of Justice. Thus, policies adopted by independent agencies can affect those of executive agencies.[347] Moreover, congressional difficulties with policy coordination pertain to all agencies.

Some independent agencies make policy that is vitally important to our national life; hence presidential interest in its formulation is both inevitable and proper. The Federal Reserve Board's monetary functions and the Securities and Exchange Commission's market regulation come to mind. Nevertheless, congressional perception of a need to insulate particular kinds of regulation from presidential supervision is entitled to some judicial deference. How are we to resolve these imponderables? Fortunately, the Court appears to be moving away from loose conceptions that whole agencies have a special constitutional status outside the executive branch, and toward a more focused inquiry whether the President has been denied a supervisory role that is appropriate to the particular function involved.[348] That appears to be implicit in *Morrison's* willingness to allow some prosecutorial functions to be made independent, without adopting the position that the entire Department of Justice could be so insulated.

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[338] Office of Legal Counsel, Department of Justice, Memorandum for Honorable David Stockman, Director, OMB, Re: Proposed Executive Order on Federal Regulation (Feb. 12, 1981), *reprinted in* P. SHANE & H. BRUFF, *supra* note 317, at 355-58 (abridged version).

[339] *See generally A Symposium on Administrative Law: "The Uneasy Constitutional Status of the Administrative Agencies,"* 36 AM. U.L. REV. 277 (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

[340] 108 S. Ct. 2597 (1988).

[341] *Id.* at 2619.

[342] Humphrey's Exec'r v. United States, 295 U.S. 602, 629-32 (1935); *see supra* text accompanying notes 30-31.

[343] For a summary of the debate over the nature of the President's powers, see *supra* text accompanying notes 5-16.

[344] *See* Bruff, *supra* note 35, at 541-42.

[345] *Morrison*, 108 S. Ct. at 2619.

[346] In Mistretta v. United States, 109 S. Ct. 647 (1989), the Court rejected a separation of powers challenge to the Sentencing Commission, an independent agency in the judicial branch that sets mandatory sentencing guidelines. The Court thought that this function was appropriately placed in the judicial branch because of historically broad judicial control over sentencing. The Court also remarked that it might be inappropriate to assign this function to the executive branch because that would combine sentencing with prosecution. *Id.* at 664 n.17.

[347] *See, e.g.*, Westinghouse Elec. Corp. v. NRC, 598 F.2d 759, 774-76 (3d Cir. 1979) (upholding the NRC's decision to suspend nuclear fuel recycling at the request of the President and in deference to his foreign policy efforts to prevent international proliferation of nuclear weapons despite a challenge that such action impermissibly interfered with the agency's independence).

[348] *See* P. SHANE & H. BRUFF, *supra* note 317, at 326.

Therefore, we need to identify kinds of rulemaking programs for which presidential supervision is not appropriate. The principal inquiry should be whether the executive's accountability can be trusted. Thus, some federal rulemaking should be excepted from executive oversight because the President's role as head of his party may give him a personal interest in the subject matter. Two prominent examples are administration of the Federal Communications Commission's "equal time" rules[349] and the Federal Election Commission's regulation of political campaigns.[350]

A second inquiry is whether political accountability would interfere with successful performance of the function. Thus, the Court might conclude that sound monetary policymaking requires the insulation from normal accountability to both President and Congress that the Federal Reserve now enjoys because short-run political considerations would hamper this function.[351]

Under this line of inquiry, some kinds of rulemaking functions should receive categorical exemption from presidential supervision. Executive Order No. 12,291 does not apply to "formal" rulemaking, which is performed according to the APA's procedures for adjudication.[352] This exception recognizes that the distinction between rulemaking and adjudication is sometimes blurred. Due process strictures apply when some individuals are "exceptionally affected, in each case upon individual grounds," by administrative action.[353] Adjudication has traditionally been protected from outside interference by anyone.[354] These due process values lurk in the cases upholding agency independence from presidential supervision because adjudicating agencies were involved.[355]

When rulemaking resembles adjudication because it involves deciding "conflicting private claims to a valuable privilege," courts have barred ex parte contacts.[356] Similarly, ratemaking should be

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[349] 47 U.S.C. § 315 (1982); *see* G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 125, at 413-21.

[350] *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (providing an exhaustive examination of the Federal Election Campaign Act of 1971, and upholding the constitutionality of the Federal Election Commission's regulation of political campaigns).

[351] For an overview of Federal Reserve monetary functions, see W. MELTON, INSIDE THE FED (1983).

[352] Section 1(a)(1) of the Order exempts actions "governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code." *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note at 432 (1982).

[353] United States v. Florida E. Coast Ry., 410 U.S. 224, 245 (1973) (quoting Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915)).

[354] The APA, 5 U.S.C. § 557(d) (1982), bars all ex parte contacts in adjudication and formal rulemaking.

[355] *See, e.g.*, Wiener v. United States, 357 U.S. 349, 349-56 (1958) (holding that the President could not remove a member of the adjudicatory War Claims Commission).

[356] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959) (involving FCC allocation of a limited number of television channels to particular communities).

excepted from executive oversight.[357] Such an exception would also respect the congressional judgment that ratemaking ordinarily should be insulated from politics.[358]

In a number of modern statutes, Congress has created rulemaking programs that are "hybrids" because they employ some adjudicative procedure.[359] This implies that ex parte contacts are inappropriate, although it does not necessarily compel that conclusion. A statute-by-statute judgment is necessary. For example, a statute may have addressed executive branch contacts explicitly, partially controlling them.[360] If not, it is necessary to assess whether oversight is appropriate for the substantive issues involved in the program.

B. *The Desirability of Statutory Controls on Oversight*

Should a statute be enacted to ratify and control presidential management of regulation? There has been sufficient experience under the executive orders to justify statutory codification. Moreover, enactment is probably feasible because there are advantages for both the President and Congress. The President could benefit by resolving lingering doubts about the program's legitimacy, and perhaps by obtaining its extension to the independent agencies. Congress could benefit by codifying disclosure practices that aid its capacity to oversee the program. Existing doubts about legality foster compromise in the legislative process; if the Court removes them with a broad endorsement of presidential power, the executive may resist statutory control of the program.

Lingering doubts about legality also affect the present nature of the program. The behavior of the participants can be expected to change somewhat under a statutory regime. At present, OMB-agency relationships usually feature negotiation. As experience in separation of powers controversies teaches, that is what we should expect in conditions of uncertainty about ultimate power.[361] If the uncertainty is removed, behavior should change somewhat. Statutory ratification of the program could produce a more peremptory approach by OMB. It is not clear, however, that the change would be very great. For example, OMB's behavior under the Paperwork Reduction Act does not seem sharply different from that under the executive orders. As all students of bureaucracy know, many variables affect OMB-agency relationships—for example, the nature of the personal relationship between an agency head and the President.

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[357] *See* ROADS TO REFORM, *supra* note 42, at 82 (exempting ratemaking from a general call for presidential supervision of rulemaking because "although technically rulemaking under the Administrative Procedure Act, [it involves] quasi-judicial functions that should be kept separate from the political process"); *cf.* United States v. Florida E. Coast Ry., 410 U.S. 224, 251-56 (1973) (Douglas, J. dissenting joined by Stewart, J.) (noting that ratemaking has adjudicative elements, and therefore requires full hearings to ensure the integrity of the ratemaking process).

[358] *See* FEDERAL REGULATION, *supra* note 46, pt. 5, at 67-81 (explaining that the creation of FERC as an independent agency within a cabinet department was intended to establish an agency somewhat removed from direct executive control because FERC's adjudicatory function should be carried out on the merits and not influenced by partisan considerations and priorities).

[359] *E.g.*, 15 U.S.C. § 57a (1982) (providing hybrid rulemaking procedures for the FTC).

[360] *E.g.*, 42 U.S.C. § 7607(d)(4)(B)(ii) (1982) (requiring under the Clean Air Act that all written interagency correspondence concerning draft proposed rules be placed in the rulemaking docket).

The informal agreement that OMB reached with its congressional oversight committees in 1986 did not establish a long-term resolution of the issues that had arisen during the Reagan administration.[362] A management program in the new administration will probably encounter strong pressure to reach a similar *modus vivendi* with the committees. In that case, the primary advantages of a statute would be to give Congress an opportunity to decide which rulemaking programs should be exempt from review, and to enact more permanent controls.

Congress has begun to consider bills that would forbid or limit OMB review of particular programs.[363] In the absence of a generally applicable statute, the executive might simply apply its program to the independent agencies, letting the courts struggle with *Morrison's* criteria to define the limits of executive management. Instead, the better course would be to put OMB review on a statutory basis, with controls reflecting experience to date.

Conclusion

Experience under the Reagan administration executive order program reflected several enduring tensions in our scheme of government. Indeed, the orders were drafted to affect the allocation of power within the executive, and between the executive and Congress. Hence it should surprise no one that conflict attended the relations of OMB with both agencies and congressional committees. Another enduring tension in administrative law, between law and politics in regulation, was also present. It was exacerbated (as was the overall level of conflict) by the adminstration's bias toward industry. From the point of view of the administration, however, the program enjoyed unprecedented success in imprinting regulation with the President's own principles.

An executive oversight program of this sort is constitutional, and is beneficial in its promotion of the political accountability of regulation. Nevertheless, its influence must be kept within the bounds of discretion conferred by existing statutory policies and the administrative records compiled in the agencies. I believe that the "paper trail" procedures that developed through OMB-congressional compromise are well suited to that task, with some modifications. In a new administration, where this experiment in government continues, the time may be ripe to place it on a more permanent statutory basis.

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[361] Executive privilege controversies between the President and Congress provide a prominent example. *See* P. Shane & H. Bruff, *supra* note 317, at 184-208.

[362] The denouement of the effort to "defund" OIRA occurred when Senate and House conferees agreed to reauthorize the Paperwork Reduction Act as part of the continuing resolution passed in October 1986. H.R. Conf. Rep. 1005, 99th Cong., 2d Sess. 349 (1986). The compromise provided for: (1) a separate line item account for OIRA in OMB's budget with authorized spending of $5.5 million for the next three years; (2) Senate confirmation of the administrator of OIRA; and (3) a prohibition on the use of the funds authorized for "any function or activity which is not specifically authorized or required by this [Act] . . . . [T]he review of a rule or regulation is specifically authorized or required by this [Act] only to the extent that such review is for the sole purpose of reviewing an information collection request contained in, or derived from, such rule or regulation." *Id.* at 355. The sponsors of the reauthorization compromise explained that OIRA could perform other functions if it obtained separate funding for them. *Id.* at 771. The appropriations act also provided $5.5 million for OIRA with no restrictive language, except to continue the prohibition against OMB review of agricultural marketing orders. *Id.* at 330.

[363] *E.g.*, S. 2443, 100th Cong., 2d Sess. (1988) (limiting review of the Nuclear Regulatory Commission).

Access Denied

New electronic technologies should make it easier for the public to get at government data, but requests are often blocked. Congress may try again to open the doors.

BY W. JOHN MOORE

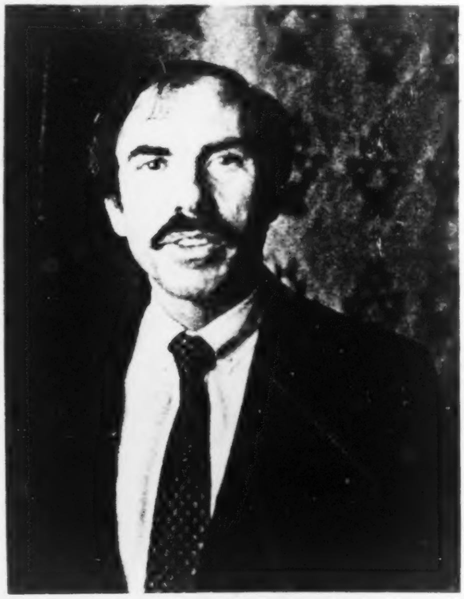
For the computer Columbus eager to explore the billions of megabytes in federal computers, this should be an age of adventure. Within the government's computers lies an ocean of information awaiting discovery by the plucky hacker armed with trusty keyboard and modem.

But reality rudely interrupts such daydreams. Government policy, particularly during the Reagan Administration, has discouraged public access to electronic information.

In the meantime, the boom in information technology has far outpaced government policies designed to manage it. So many data bases have sprung up within the federal government that there's not even an up-to-date official list, printed or computerized, of what is available. "The federal government today stands at a major crossroads," Congress's Office of Technology Assessment (OTA) concluded in a 1988 study, *Informing the Nation: Federal Information Dissemination in an Electronic Age*. "Congressional action is urgently needed to resolve federal information issues."

With the blessings of industry and public-interest groups, the Bush Administration and Congress seem ready to resolve some of these issues through compromise amendments to the 1980 Paperwork Reduction Act. The amendments would finally set some ground rules for making electronic information available to the public.

For advocates of public access, a new government policy can't come too soon. Over the past decade, public-interest groups have warned that the public has been shortchanged during the information revolution because citizens' rights to access have largely been ignored. "Outmoded government information law and policies are creating new forms of government secrecy in the computer age and inequities between different constituencies in terms of their ability to afford, access and use electronic public information," Jerry J. Berman, director of the Information Technology Project at the American Civil Liberties Union (ACLU), wrote in an essay published last year by the Markle Foundation.



Richard A. Bloom

Rep. Robert E. Wise Jr., D-W.Va.
He helped hammer out the agreement on electronic data bill.

Nothing has bedeviled public-interest groups or business like the repeated skirmishing over whether the 1966 Freedom of Information Act (FOIA) applies to electronic information such as data bases. Horror stories abound of agency inaction and Justice Department intransigence on FOIA requests.

The Labor Department's Occupational Safety and Health Administration (OSHA), for example, refused the Public Citizen Litigation Group's request for computerized data on company compliance with federal laws. OSHA said such an effort would involve complicated programming efforts. And, it said, the information was no longer available in printed form.

Even victory can be turned into defeat. After winning a legal battle with the CIA over access to a list of previous FOIA requests, the National Security Archive, a Washington watchdog group, was rewarded with a three-and-a-half-foot-high mound of computer printouts instead of floppy disks.

Businesses complain, too. The Interior Department refused to give computerized files of 100-year-old land data to an energy company. Until litigation began, the Government Printing Office declined to give a publisher a computerized list of *Federal Register* subscribers.

Fixing the FOIA problem

will be tricky. Some information policy experts favor an electronic FOIA. But others worry that opening the law to amendment would be risky because businesses, law enforcement agencies and some other government agencies would push for further exemptions. Litigation has produced enough victories that some public-interest attorneys favor continued efforts in the courts.

Even if the government decides to make computerized data available, other major problems arise over data dissemination. During the Reagan era, the Office of Management and Budget (OMB) called the shots on information policy. OMB wanted private industry to disseminate electronic information.

Much of the discussion has been obscured by the lingo of computer professionals. But the debate is over control of information, the lifeblood of the economy in the 21st century. Public-interest groups have warned that under OMB's policies, information barons eventually would control these data, becoming the next century's equivalent of the railroad and oil monopolies of a century ago. High-priced agency data banks with exorbitant on-line costs would serve only corporate users, and average citizens would be unable to use the systems, critics say.

"The United States is in danger of becoming an information autocracy," Alan F. Westin, a Columbia University law professor, told the House Government Operations Subcommittee on Government Information, Justice and Agriculture last May. "The lords of the new information age will be the financially and technologically well-endowed."

PUBLIC OR PRIVATE?

Over the past decade, a computer revolution has transformed government operations. In 1982, the government spent $9.2 billion on information technology, according to the OTA report, and by 1988, expenditures were $15 billion.

Information USA Inc., a San Diego company, in a 1987 report listed 440 federal data bases. One is the Commerce Department's National Technical Information System, which distributes computer tapes and diskettes of mostly hard-core scientific data. No threat to Tom Clancy thrillers here: Its best-seller is *Urban Hydrology for Small Watersheds.*

The Bureau of National Affairs Inc., a Washington publisher, estimated that the government provides on-line or direct telephone access to about 50 data bases, including the Census Bureau's CENDATA system and Labor Department statistics.

More often, a private company, through private data bases, sells government information to the public after adding special features such as indexes or user-friendly instructions.

John Eisele

Jerry J. Berman of the American Civil Liberties Union
He favors rewriting the Freedom of Information Act to bring it up to date.

Major electronic data collection and dissemination programs are in place at some agencies and departments. These include a variety of programs.

Under congressional mandate, the Environmental Protection Agency (EPA) has set up the first federal public-access data base to help the public get computerized information on toxic chemicals. The Federal Maritime Commission has an electronic filing system for shipping rates. The U.S. Patent and Trademark Office has the Automated Trademark System. Perhaps the best-known is the Securities and Exchange Commission (SEC) Electronic Data Gathering System, or EDGAR, which will eventually handle six million pages of securities filings a year at a cost of $10 million annually over the next five years. Even the government's most traditional arm, the Supreme Court, announced in December its Operation Hermes, a plan to disseminate its opinions electronically.

The electronic revolution will continue, if only because of continued advances in technology. Consider the CD-ROM (compact disk read-only memory), a $2 item that provides a quantum leap in information management. A CD-ROM stores the equivalent of 1,650 floppy disks, 30 hard disks or 15 computer tapes.

The public's access to government data on a CD-ROM has never been been clarified, however. The Reagan Administration, in fact, discouraged on-line access.

In 1985, OMB announced, in Circular A-130, a policy calling for "maximum feasible reliance" on the private sector for dissemination of government information. Last year, OMB proposed amendments to that policy. The revised circular told federal agencies to provide raw computer information to private companies, essentially at cost. Moreover, OMB said, the government should not get into the information processing business by making data easier to use.

The proposals provoked more than 200 negative responses. Most respondents said that under OMB's proposals, corporate information giants could buy government computer tapes at low cost, load the data on mainframe computers and resell the data, at a marked-up price, to on-line subscribers. "Although government user fees for unstructured government data will be low, nothing will prevent private distributors from making a commercial killing," the Public Interest Computer Association told OMB last April. "The taxpayer will be ripped off."

In October, *PC/Computing* magazine reported that South Dakota Gov. George S. Mickelson was outraged after an aide told him that information from an Agriculture Department data base was available only from a government contractor, Martin Marietta Corp., at a cost of hundreds of dollars.

Last year, a battle royal erupted over a Federal Maritime Commission plan to computerize some shipping rates and provide the data on-line to interested parties. Transax/Rates, a division of Knight-Ridder Newspapers Inc.'s Journal of Commerce Inc., bitterly opposed the proposal, as did the Information Industries Association and OMB. Transax/Rates had spent million of dollars in the 1970s to produce a computerized data base using commission tariffs. A congressional compromise last year resolved the issue by allowing limited on-line access to the data.

The SEC's EDGAR, meanwhile, encountered repeated start-up problems and delays in implementation. And some critics say that on-line hourly rates charged by private information companies—$150 is the rate for users of some services offered by Mead Data Central Inc., for example—are too expensive. The National Library of Medicine's MEDLARS program charges on-line users only $25 an hour.

Patti A. Goldman of the Public Citizen Litigation Group
She says that the rush to amend the Freedom of Information Act is premature.

Richard A. Bloom

For advocates of public access to information, Congress took a big step by passing the 1986 Superfund Amendments and Reauthorizaton Act, which set up the EPA data base as a way of meeting community right-to-know objectives. *(See NJ, 11/26/88, p. 3006.)*

More than 30,000 companies are required to file reports on 300-plus toxic substances. The information goes into a data base known as the Toxic Release Inventory (TRI). Only limited user fees are permitted, and fees are waived for public-interest searches.

The implementation of the TRI has been less than perfect, however. Gary D. Bass, executive director of OMB Watch, a public-interest watchdog group, said the program has been bogged down with mistakes because of lack of money, education and outreach efforts. Citizens' use of the TRI represents only about 1 per cent of the total usage of the system, Bass said; the major users, he said, are companies that want to find out what their competitors are up to.

CONGRESSIONAL ACTION

Nevertheless, Congress, by insisting on this open-disclosure program, showed that it would not go along with the private-sector approach pushed by OMB. And the compromise bill on electronic data is designed to expand public access.

The Reagan-era federal policy may soon change. Under the compromise worked out last fall between public-interest groups, the information industry and, apparently, OMB officials, new language has been added to the pending reauthorization of the Paperwork Reduction Act.

The changes would affirm the public's right to have access to electronic communication. Costs to users would be as low as possible, and fees would be waived when appropriate. Federal agencies would have to consider competing efforts by information companies, but the new provisions would reject making privatization the solution in all instances. OMB would still call the signals on government information policy, but agencies would be given more latitude to go their own way on data dissemination.

"We're trying to impose some affirmative obligations on federal agencies and OMB," said Rep. Robert E. Wise Jr., D-W.Va., chairman of the Government Operations subcommittee. Wise, who helped hammer out the agreement, called the bill's chances for enactment "reasonably good," given the bipartisan support for the compromise language and the need to reauthorize the paperwork law.

The bill draws cheers from most computer information experts. It "would be a major step forward in establishing a public policy favoring public access to electronic information," said the ACLU's Berman, a Benton Foundation fellow.

"The legislation is giving the congressional intent that government has the responsibility for making its own information readily available to users," said Fred B. Wood, a senior associate in OTA's Communication and Technologies Program and author of the OTA study.

Critics and even some supporters of the Wise bill fear that OMB would retain too much clout. The American Library Association, in a blistering letter to Wise, adamantly opposed the measure. Other advocates of public access such as Public Citizen and OMB Watch share some of the concern about OMB's role. "But there is a recognition that the worst possible step is to basically leave OMB without any statutory guidance at all," said David Plocher, a staff attorney with OMB Watch. Plocher also said he sees a change of heart at OMB in the Bush Administration: "a kinder, gentler OMB, I think."

"I think the bill is reasonable," Wise said in an interview. "It is a consensus document.

"We have to start down the road of dealing with the dissemination of electronic information," Wise said. But the legislation has limited goals, he added: "No way is it an electronic Freedom of Information Act."

OPEN ACCESS

As envisioned by its supporters, amending FOIA for the electronic age would finally guarantee citizen access to computer data bases, files, magnetic tapes, CD-ROMs and other formats.

Enacted in 1966, FOIA has opened gold mines for journalists, librarians, scholars and even commercial users hoping to extract vital data from the federal government's trove of paper documents. In 1988, FOIA requests surged to 394,914 at all federal agencies, according to Justice Department figures.

But questions about using FOIA to obtain government computerized data remain largely unanswered. There is general, albeit not total, agreement that electronic data can be subject to FOIA. Various federal courts have enunciated such a policy. In 1988, the Administrative Conference of the United States scolded agencies for frustrating the public's efforts to obtain computerized data. Last year, the American Bar Association (ABA) Committee on Access to Government Information and Privacy also warned federal agencies against construing FOIA to exclude computer records and programming.

A recent Justice Department survey of department and agency practices on handling electronic FOIA requests revealed a generally restrictive policy on computer information. But the responses differed tremendously from agency to agency. "What's amazing if you read these agency responses is this palpable fear of the electronic future," said Thomas Blanton, deputy director of the National Security Archive.

Some agencies have refused an FOIA request for certain types of computer data on the ground that the data are not government records. Many other agencies decline to reprogram their computers to help find information. Virtually all agencies refuse to release information in the format requested instead of on paper.

Former White House aide Oliver L. North's computer messages to national security advisers Robert C. McFarlane and John M. Poindexter are the subject of a major FOIA suit brought by the National Security Archive. A key issue is whether "electronic mail" is subject to FOIA. The Bush Administration has argued that electronic mail is analogous to a telephone call, and therefore is not a record that need be disclosed.

Nor have most agencies proved generous in covering the costs of such requests. Last summer, a Ralph Nader publication, *Multinational Monitor*, asked the Coast Guard for electronic data on oil spills. The Coast Guard waived the $9,000 search fee because the requesters were journalists, but not the $1,000 administrative charges. The Coast Guard ruled that release of the information was not necessarily in the public interest.

The public access community is divided over the best way to go after data. Berman and others favor congressional action; specifically, a rewrite of FOIA to bring the aging statute up to date. "Let Congress do it," Berman said. "The worse thing that can happen is that you don't reach a consensus and the bill dies," Berman said, while conceding that an electronic FOIA is not likely to emerge from Congress anytime soon.

The 1988 OTA report urged congressional action. Wood said that strong legislation would send a message to government agencies about the seriousness of FOIA requests.

Placing computer information under FOIA should be only a part of a legislative agenda, said Washington lawyer John D. Podesta, a co-chairman of the ABA's privacy committee. Podesta advocates an expansion of federal agencies' responsibilities in producing and sharing electronic data. At an October conference sponsored by the Benton Foundation, he suggested that agencies be required to publish in the *Federal Register* an assessment of all data stored electronically. Information provided to a requester should be made available on-line to others, he said. Government data bases should be created with FOIA in mind to ease citizen access, he added.

Podesta predicted that electronic FOIA legislation eventually will be introduced. But he acknowledged that many of his brethren who favor more access worry about unwanted changes in FOIA. "They're coming off of eight years of really being in the trenches, fighting a defensive game," he said. "And just because I yell 'Charge!' doesn't mean that they are willing to go over the top."

GOING TO COURT

Many proponents of applying FOIA to computerized data prefer to wage a guerrilla war through the federal agencies and the courts instead of a clash on Capitol Hill. "The rush to amend the act is premature," Patti A. Goldman, a staff attorney in Washington with the Public Citizen Litigation Group, suggested at a recent conference. "At this stage in the development of electronic information systems, it would be far more prudent to shape agencies' practices in applying the FOIA to such information rather than to revise the FOIA's principles." Instead of revamping FOIA to explicitly cover electronic data, Goldman recommended, the law's principles can be interpreted to do the job.

"You don't want to amend [FOIA] too many times," says Ronald L. Plesser, a Washington lawyer.

"Yes, it is true that litigation is plodding. And you don't always get good decisions," said FOIA expert Allan R. Adler, a lawyer with the Washington law firm of Cohn and Marks.

"But it is also true," he said, "that if you run to Congress before you have a chance to air these issues out in the courts, you do run the danger that every time you go to Congress with a proposed FOIA amendment, you're likely to come back with something much worse and much different than you had in mind.

"At the same time," Adler said, "it is quite possible that the courts may be rational about this and may be willing to explore the intent of Congress in a way that leads them to come to a practical result acceptable to the FOIA community."

So far, the results in the courts and agencies are mixed.

Faced with litigation, many agencies lose their initial enthusiasm for a narrow interpretation of FOIA. The Federal Reserve Board, for example, denied a request for computer software used to predict the probability of a recession on the ground that a computer program was not a government record subject to FOIA. But on appeal, the Fed dropped that argument.

Many federal agencies have refused to do any computer searches that involve new programming efforts, saying that the programming involves creation of a new record, not production of an old one. OSHA repeatedly refused to provide company-specific inspection records because, it said, inserting the name of a company into a computer was defined as programming. But OSHA capitulated after expanding its computer capabilities, according to Goldman.

A 1984 decision in the U.S. District Court for the District of Columbia is considered a setback by FOIA attorneys because the ruling seems to allow federal agencies to release data in the format of their choice. Nevertheless, appellate court decisions have generally provided more access to records, according to the attorneys. Last year, the Supreme Court held in favor of broader access to electronic data.

Those decisions have persuaded many FOIA experts to reject a legislative fix. "FOIA is like the Holy Grail," said Ronald L. Plesser, an attorney in the Washington office of the Baltimore-based law firm of Piper & Marbury. "You don't want to amend it too many times."

Only a devastating court decision severely restricting access to electronic data would produce a push on Capitol Hill to revisit FOIA, predicted Thomas M. Susman, an attorney in the Washington office of Ropes & Gray, a Boston-based law firm. "But in the absence of such a decision, I don't see a catalyst for legislation."

Wise said that his opinion on FOIA legislation has changed. "The court is responding to this area in a positive way," Wise said. "I want to see what future court rulings have to say as opposed to legislating our way into the 21st century."

After years of setbacks during the Reagan era, advocates of expanded access voice cautious optimism about the future. A smattering of favorable court rulings, the prospect for a bill reversing OMB's position on access to information and greater experience with government data have contributed to this view.

Public Citizen's Goldman acknowledged that the pace is slow. But "we've made some progress because of all of this education and dialogue," she added. And the ACLU's Berman said, "Things are looking up." ☐

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November 13, 1989

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The Honorable Jeff Bingaman
524 Senate Hart Office Building
U.S. Senate
Washington, D.C. 20510

Dear Senator Bingaman:

I want you to know how much we appreciate your efforts to fashion an affirmative Paperwork Reduction Act reauthorization bill. The work of Ed Jayne and other Subcommittee staff should be commended and, accordingly, we want you to know that OMB Watch supports the thrust of S. 1742. It addresses many issues squarely and moves towards a resolution of others. We hope the bill will move forward as quickly as possible.

Enclosed are two documents. The first is a copy of our new report, "Playing the Numbers," which describes OMB's actions under the Paperwork Reduction Act during 1988. The report highlights the need to amend the Act, particularly with regard to balancing the benefits derived from information with the goal of reducing paperwork.

The second is a joint letter from a number of different organizations following the Paperwork Reduction Act reauthorization process. We are deeply concerned that funding for the Act expired October 1 and Congress still has not passed a reauthorization bill. The letter affirms support for the thrust of S. 1742. We hope the full Committee will move the bill as soon as possible.

Our report provides empirical support for the direction of your bill. Our report shows that 1988 paperwork from OSHA, EPA, and HUD ran into OMB interference up to almost four times as often as the government-wide average. OMB particularly resisted paperwork needed to carry out regulations. Furthermore, regulations proposed by EPA and the Departments of Labor, HUD, and HHS were overruled by OMB at twice the government-wide rate in the first half of 1989 under the new Administration -- continuing a trend from the last Administration.

The report also explains that the less than three dozen OMB Desk Officers who review virtually all government paperwork and regulations often lack expertise in the subjects they review. Nearly half of all Desk Officers had no federal experience at all before working at OMB, and another 31 percent had federal experience unrelated to the agencies they covered in 1988. This left less than one-quarter of the Desk Officers with any experience relevant to the paperwork and regulations they reviewed during 1988.

The report has many other illuminating points, which complement a recent General Accounting Office report, "Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability" (PEMD-89-20, September 1989). Our findings are consistent with the GAO report, but expand on it in three ways. Our report analyzes OMB reviews of specific agencies. It provides data on how OMB reviews affect paperwork contained in regulations. And it describes, with significant detail, who makes the decisions at OMB.

We appreciate your consideration of our report as you pursue reauthorization of the Paperwork Reduction Act. We stand ready to assist in any way we can to improve the Act, which we consider one of the most important information laws in our country.

Yours truly,

Gary D. Bass
Executive Director

Enclosures

November 13, 1989

Senator John Glenn
Chairman
Senate Governmental Affairs Committee
340 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Senator Glenn:

The undersigned organizations, participants in the Working Group on Information and Regulatory Policy, are writing about a matter of common concern. Participating in the Working Group, which was formed last May, are myriad organizations with varied outlooks and constituents -- labor unions, good government advocates, public interest groups, consumer groups, environmental groups, civil liberties groups, and more.

The matter of common concern, which needs your personal attention, is the Paperwork Reduction Act. Funding for the Office of Management and Budget's (OMB) paperwork reduction operations officially expired on October 1.

As you know, the Paperwork Reduction Act, passed at the end of 1980, is one of this country's most far-reaching information laws, covering much more than just paperwork reduction. The Act centralized in OMB responsibility to oversee nearly every government information function, including information collection and dissemination, statistical policy, privacy, and more. Decisions made under its authority have a significant effect on virtually all government programs and activities.

Much more than government paperwork is at stake. The record of the last eight years of OMB's implementation of the Act clearly demonstrates the need for reform. The record shows that OMB has used the Act to impose an ideological agenda on agencies, circumvent the will of Congress and the courts, change the focus of the substantive work of agencies, and, in general, micro-manage the affairs of other agencies.

While almost every American can agree with the Act's goal of reducing the burden of unnecessary and duplicative federal paperwork, we believe the Act needs improvement. At the same time, the improvements we support would in no way impede OMB's ability to continue to reduce genuine paperwork burdens on the American public.

Identical letter sent to Committee Ranking Minority Member William V. Roth, Jr.

First, greater and stronger public participation opportunities need to be written into the OMB process for reviewing paperwork. The more sunshine in the process, the more open and accountable OMB will be.

Second, the Act should set procedural safeguards and specific criteria for Executive Branch regulatory review. For example, the Act should set time limits for OMB regulatory review and require OMB to document contemporaneously, as part of the public record, all written and oral communications, with people and organizations inside and outside of government, about a rulemaking under review. Again, the more sunshine, the more accountable OMB will be and the more legitimate the final agency rulemaking decision will be.

Third, the Act should affirm the responsibility of agencies to disseminate information, including electronic information. The Act should prescribe federal direction to protect our democratic right-to-know principles and prevent the United States from becoming a nation where information belongs to the highest bidder. After all, information is critical to our democracy -- without it, citizens simply cannot participate in their government.

Fourth, the Act should direct OMB to pay more attention to other information resources management functions, besides paperwork reduction. For example, statistical policy, which Congress included in OMB's responsibilities under the Act, has deteriorated to the point where our federal statistical infrastructure is greatly weakened, impeding our ability to address economic and social problems.

The bill that Senator Jeff Bingaman introduced, after holding a series of hearings, begins to address these problems. While the improvements mentioned above need to be made, we support the thrust of his bill, S. 1742, and we urge you to do the same.

Now is the time to act. Reauthorization offers an important opportunity to review OMB's performance, correct past problems, clarify congressional intent, and set a proper course for OMB activity and the future of government information collection and dissemination. Letting this opportunity pass, with no action, would not be in the best interests of federal information policy, the Congress, or the American people.

Thank you for your consideration. We look forward to working with you to reauthorize -- and improve -- the Paperwork Reduction Act.

Signed,

Alliance for Justice
American Civil Liberties Union
American Federation of State, County, and Municipal Employees
Association of Research Libraries
Center for Community Change
Children's Defense Fund
Computer Professionals for Social Responsibility
Consortium of Social Science Associations
Consumer Federation of America
Environmental Defense Fund
National Audubon Society
National Education Association
National Wildlife Federation
Natural Resources Defense Council
OMB Watch
People for the American Way
Public Citizen
Special Libraries Association
Unison Institute
United Auto Workers
United Steelworkers of America

cc: Senate Majority Leader George Mitchell
Senate Majority Whip Alan Cranston
Senate Minority Leader Robert J. Dole
Members of the Senate Governmental Affairs Committee

Texas A&M University

DEPARTMENT OF POLITICAL SCIENCE
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2 February 1990

Senator Jeff Bingaman
Subcommittee on Government Information
and Regulation
Senate Committee on Governmental Affairs
Washington, D.C. 20510-6250

Dear Senator Bingaman:

Steve Katz has asked us to comment on the provisions of S.1742 relating to the Office of Information and Regulatory Affairs and its review of agency rulemaking. We have been interested in executive and legislative oversight for some time, and our studies suggest that the bill is a sound response to important problems raised by Ronald Reagan's E.O. 12291 and other efforts by recent Presidents to establish centralized control over administrative regulation.

The provisions of S.1742 requiring public disclosure of OIRA actions and communications are salutary in that they will help preserve the integrity of the administrative process. A growing body of evidence indicates that OIRA contacts with both private interests and agency officials pursuant to E.O. 12291 have frequently been informal and off-the-record. It further suggests that these communications sometimes produce significant changes in administrative policy. Influences exercised in this way obviously subvert the goals of the Administrative Procedure Act and other constraints imposed by Congress and the courts to promote openness and fairness in agency rulemaking.

Even more important, perhaps, public disclosure, in combination with the bill's provision of more direct budgetary control over OIRA, can aid the legislature in its efforts to ensure that its policies are carried out faithfully. The programmatic interests of the President frequently differ from those of Congress, and OIRA has sometimes used its influence to impede the implementation of statutory directives in Occupational Safety and Health, Environmental Protection, and other areas. The need for effective mechanisms to counter such abuses is especially acute when the problem is viewed in a broader institutional context. As Congress has been forced to delegate more and more authority to executive agencies, its ability to conduct meaningful oversight of the administrative process has become increasingly important as a means of fulfilling its constitutional obligation to determine the shape of public policy. At the same time, however, the courts have thwarted key adaptations to this end. As we have argued in our work, cession of unchecked administrative power to the President must be evaluated by including it in the same equation with increased delegation and with recent court cases such as *Chadha* and *Bowsher v. Synar*. Although the Court now shows signs of increased flexibility in the *Morrison* and *Mistretta* cases, S.1742 is a positive step in helping to redress a significant distortion in the balance of constitutional power that has resulted from these developments.

The objection that S.1742 would only serve to legitimize OMB review is not convincing and does not deserve to be controlling. Centralized executive clearance of agency regulations is very much a reality. Moreover, formal statutory recognition of executive review mechanisms such as E.O. 12291 and E.O. 12498 does not speak directly to the issue of their constitutionality, and on the basis of past experience should be of little consequence before the courts. As in the case of presidential objection to legislative veto provisions they signed prior to *Chadha*, the constitutional status of questions rests on their legal merits, not on actions by the President or Congress in which they seek to deal with existing realities. Indeed, how could it be otherwise?

In brief, then, we feel that the provisions of S.1742 relating to OIRA are needed reforms. We appreciate being asked to comment on S.1742 and will be glad to assist the Subcommittee on Governmental Information and Regulation in any way that we can.

Sincerely,

William F West
William F. West
Texas A&M University

Joseph Cooper
Joseph Cooper
Rice University

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January 17, 1990

The Honorable Jeff Bingaman
United States Senate
Washington, DC 20510-4703

Dear Senator Bingaman:

I write to express my support for your recently introduced bill dealing with the Paperwork Reduction Act and the Federal government's information dissemination practices.

I believe your bill provides broad information principles that will guide the Federal government and will encourage public access to information. It will permit the government to retain a certain necessary flexibility in managing its information resources, and, most important, recognizes that all information cannot be managed exactly alike.

I also wish to voice my strong objections to the bill on the same subject introduced by Representative Conyers. I am deeply concerned about provisions in Mr. Conyer's bill (specifically, H. R. 3695, at Sec. 103.(c) (2) (D) that would prohibit the government from exercising controls over its own data. While this may seem to be in the public interest, the very opposite effect would occur in the case of the medical information resources currently administered by the National Library of Medicine (NLM). The NLM has a mandate to disseminate biomedical information to health professionals in order to improve the public health. The Library fulfills this mandate in many ways, including providing direct online access to information databases through its MEDLARS system at NLM, as well as providing access to this information through online services at other sites, both public and private, through license agreements. Whatever the mechanism, I can assure you that most certainly in medicine, the integrity of the information is as essential to its users as its availability. I believe that Mr. Conyer's proposal to prohibit agencies -- thus NLM -- from exercising controls would compromise the quality and integrity of the NLM data. Without controls, NLM cannot ensure that the biomedical community, which assumes MEDLARS data has the NLM "seal of approval" no matter where or how it is obtained -- receives up-to-date information. Nor could NLM ensure that the software being used retrieves the data correctly and comprehensively. This is a grave concern.

Many members of this College use the services of the NLM and depend upon the very information resource Mr. Conyer's proposal would jeopardize. The NLM represents one of the Federal government's outstanding successes, and one that continuously contributes to the prospect of improved health for all of us. In reconciling these bills, I urge that you eliminate any consideration of those objectionable provisions that would damage the invaluable services of that remarkable institution.

Sincerely,

Morris F. Collen

Morris F. Collen, MD
Past President, ACMI

MFC/smb
cc: Senator Mark Hatfield
Senator Edward M. Kennedy
Senator Warren Rudman

Ans.
copy the and
[illegible]
file [illegible]

BAYLOR COLLEGE OF MEDICINE
ONE BAYLOR PLAZA
HOUSTON, TEXAS 77030

90 JAN -2 AM 11:56

OFFICE OF THE [illegible]

December 26, 1989

The Honorable Jeff Bingaman
United States Senate
Washington, D. C. 20510-4703

Dear Senator Bingaman:

I wish to express my support for your recently introduced bill dealing with the Paperwork Reduction Act and the Federal government's information dissemination practices. I also wish to voice my strong objections to the bill on the same subject introduced by Representative Conyers.

I believe your proposal does an admirable job in producing broad information principles that will guide the Federal government and will encourage public access to information. It will permit the government to retain a certain necessary flexibility in managing its information resources, and, most important, recognizes that all information cannot be managed exactly alike.

I am deeply concerned about provisions in Mr. Conyer's bill (specifically, H.R. 3695, at Sec. 103.(c) (2) (D) that would prohibit the government from exercising controls over its own data. While this may seem to be in the public interest, the very opposite effect would occur in the case of the medical information resources currently administered by the National Library of Medicine (NLM).

The NLM has a mandate to disseminate biomedical information to health professionals in order to improve the public health. The Library fulfills this mandate in many ways, including providing direct online access to information databases through its MEDLARS system at NLM, as well as providing access to this information through online services at other sites, both public and private, through license agreements. Whatever the mechanism, I can assure you that most certainly in medicine, the integrity of the information is as essential to its users as its availability. I believe that Mr. Conyer's proposal to prohibit agencies -- thus NLM -- from exercising controls would compromise the quality and integrity of the NLM data. Absent controls, NLM cannot ensure that the biomedical community, which assumes MEDLARS data has the NLM "seal of approval" no matter where or how it is obtained -- receives up-to-date information. Nor could NLM ensure that the software being used retrieves the data correctly and comprehensively. This is a grave concern.

I have had a long association with the NLM, and have devoted great portions of my time promoting throughout this country the very information resource Mr. Conyer's proposal would jeopardize. The NLM represents one of the Federal government's outstanding successes, and one that continuously contributes to the prospect of improved health for all of us. In reconciling these bills, I urge that you eliminate any consideration of those objectionable provisions that would damage the invaluable services of that remarkable institution.

Sincerely,

Michael E DeBakey

Michael E. DeBakey, M. D.
1-ps

Xc: Senator Warren Rudman
Senator Mark Hatfield
Senator Edward M. Kennedy

Copy, [illegible] and file

UNIVERSITY OF MARYLAND AT BALTIMORE

Office of the President
520 West Lombard Street
Baltimore, Maryland 21201-1691

90 JAN 31 PM 2:46

(301) 328-7004
FAX (301) 328-5483

January 25, 1990

The Honorable Jeff Bingaman
United States Senate
Washington, D.C. 20510-4703

Dear Senator Bingaman:

I am writing to express my support for the "Federal Information Resources Management Act" which you have recently introduced. I also want to express my objections to the bill dealing with similar matters introduced by Representative John Conyers.

It is important that the Federal government retain necessary flexibility in managing its information resources and that it recognize that all information cannot be managed in the same way. I believe that your proposal establishes broad information principles which will guide the government and encourage public access to information.

I am, however, very concerned about provisions in Representative Conyer's bill. H.R. 3695, Section 103.(c)(2)(D) prohibits the government from exercising control over its own data. Although the language in the bill appears to be in the public interest, the opposite is true in the case of medical information distributed by the National Library of Medicine.

The NLM has a mandate to disseminate biomedical information to health professionals in order to improve the public health. The library fulfills this mandate in many ways, including providing online access to databases through its MEDLARS system. This data is provided to other sites, both public and private, for mounting on local computers under licensing agreements. This broad availability is extremely important to health professionals as long as the integrity of the data can be insured. I believe that Mr. Conyer's proposal would prohibit NLM from exercising controls over the quality and integrity of the data. Without such controls, NLM cannot ensure that the biomedical community receives up-to-date information. NLM would not be able to ensure that the software being used at various local sites retrieves the data correctly and comprehensively. Medical professionals across the country rely on this data and assume that, whatever its immediate source, it is a product of the NLM and is worthy of trust.

Dental School Graduate School School of Law School of Medicine School of Nursing School of Pharmacy School of Social Work
Maryland Institute for Emergency Medical Services Systems

The Honorable Jeff Bingaman
January 25, 1990
page two

The issue of governmental controls over information is a very delicate one. It is important that we allow for the free transmission of information and the access to various data bases, but it is also important that the data that is made accessible to individuals is accurate and reliable.

I cannot overstate the value of the information resources developed and distributed by the NLM. Clinicians, researchers and students at the University of Maryland access this data both online and in printed format thousands of times each year. The integrity of this information must be preserved. NLM represents one of the Federal government's outstanding successes, one that continuously contributes to the prospect of improved health care for all Americans. In reconciling these bills, I urge that you eliminate any consideration of the objectionable provisions which would damage the invaluable services of the National Library of Medicine.

Sincerely,

William J. Kinnard, Jr., Ph.D.
Acting President

WJK/slr

Council of Professional Associations on Federal Statistics
Suite 402, 1429 Duke Street, Alexandria, VA 22314-3402 ● (703) 836-0404

January 10, 1990

The Honorable John Glenn
United States Senate
Washington, D.C. 20510

Dear Senator Glenn:

On behalf of the Council of Professional Associations on Federal Statistics, I am writing to express our continuing interest in activities related to the reauthorization and amendment of the Paperwork Reduction Act. As we indicated in our earlier letter to you [copy enclosed], our Council has long been concerned about the priority accorded and the resources devoted to federal statistical policy and coordination activities. Last fall, we had the opportunity to review the legislative proposal [S.1742] offered by Senator Bingaman, and found that it included a number of provisions that would begin to address these concerns.

It is our understanding that the Governmental Affairs Committee will be considering the reauthorization of the Paperwork Reduction Act shortly, and that you may be holding hearings as part of this process. If you would find it helpful for us to provide testimony, or to assist you in some more informal way as you proceed with your consideration of this critical legislation, we would be pleased to be of assistance. We look forward to having the opportunity to work with you on initiatives to strengthen the statistical programs that inform our Nation's economic and social policymaking.

Sincerely,

Courtenay M. Slater

Courtenay M. Slater
Chair

Enclosure

American Agricultural Economics Association • American Association for Public Opinion Research • American College of Epidemiology
American Economic Association • American Marketing Association • American Political Science Association • American Psychological Association
American Public Health Association • American Sociological Association • American Statistical Association
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Council of Professional Associations on Federal Statistics
Suite 402, 1429 Duke Street, Alexandria, VA 22314-3402 ● (703) 836-0404

September 18, 1989

The Honorable John Glenn
United States Senate
Washington, D.C. 20510

Dear Senator Glenn:

At its meeting on September 15, the Council of Professional Associations on Federal Statistics (COPAFS) reviewed the proposed amendments to the Paperwork Reduction Act prepared by the Subcommittee on Government Information and Regulation. As you may know, COPAFS has been concerned over the past several years about developments that have affected the priority accorded and the resources devoted to federal statistical policy and coordination activities. Last June, COPAFS adopted and subsequently transmitted to the Subcommittee a statement expressing our views on this matter (copy enclosed). We believe that the provisions of the proposed amendments prepared by the Subcommittee represent positive and important legislative steps to address our concerns.

While members of COPAFS are interested in many aspects of the proposed amendments, including initiatives related to information dissemination, paperwork burden, and information resources management, we want particularly to express our support for the provisions that would:

require OMB to give equal emphasis to all major information policy functions, including collection, dissemination, technology, records management, statistics, and information resources management;

strengthen the statistical policy mandate by explicitly requiring OMB to coordinate and provide leadership for the development of the federal statistical system, to develop a summary and analysis of allocations for statistical programs that would be submitted as part of the President's budget, and to ensure that data are made available to the public in a timely manner;

establish an ongoing Advisory Committee on Statistical Policy, and an interagency working group headed by the chief statistician; and

create a Commission on Federal Information to examine long term needs for information and statistical data, to identify gaps and other deficiencies in existing data, to suggest priorities for data collection, and to propose organizational structures for coordinating our decentralized statistical system and ensuring ongoing improvements.

American Agricultural Economics Association • American Association for Public Opinion Research • American College of Epidemiology
American Economic Association • American Marketing Association • American Political Science Association • American Psychological Association
American Public Health Association • American Sociological Association • American Statistical Association
Association for University Business and Economic Research • Association for Vital Records and Health Statistics • Association of Public Data Users
Industrial Relations Research Association • Population Association of America • Society of Actuaries • The Gerontological Society of America

In addition, we are pleased to note the affirmative emphasis of this legislation evidenced by the suggested citation, the "Federal Information Resources Management Act of 1989," and by the incorporation of explicit statements of purpose that highlight needs to "ensure the greatest public benefit from information collected, maintained, used, disseminated, and archived by the Federal government" and to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and efficiency in Government and society."

In sum, we support the direction taken in the discussion draft and appreciate having had the opportunity to comment. We look forward to working further with you on efforts to strengthen our capacity to define our Nation's statistical needs and to ensure that these needs are met.

Sincerely,

Courtenay M. Slater

Courtenay M. Slater
Chair

Enclosure

American Statistical Association
1429 Duke Street, Alexandria, Virginia 22314–3402
(703) 684–1221

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August 28, 1989

Vincent P. Barabba, *President-Elect*
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Detroit, MI 48202
(313) 556–9460

Honorable John Glenn
United States Senate
Washington, D.C. 20510

Dear Senator Glenn:

The last time we discussed matters of Federal Statistical Policy, I was serving my second stint as Director of the Census Bureau. As you can tell by the letterhead, I am currently serving as the President-Elect of the American Statistical Association, all of which leads to this letter.

At its recent meeting in Washington, the Board of Directors of the American Statistical Association reviewed with deep interest concerns about the effectiveness of current activities related to federal statistical policy and coordination, and considered the opportunities for improvement that might be available as the Congress considers the reauthorization of the Paperwork Reduction Act. In particular, we had the opportunity to discuss some of the options now being debated under your leadership, and to study recommendations that have been transmitted to you by the Council of Professional Associations on Federal Statistics (COPAFS). As a result of our deliberations, I have been asked to inform you that the American Statistical Association shares the views that have been expressed by COPAFS, and endorses the recommendations that organization has submitted to you.

ASA's interest in our federal statistical system and the need to provide adequate resources for its maintenance and improvement is hardly new. Over the years, our association has been an active participant in initiatives aimed at ensuring the quality, integrity, and accessibility of the government's statistical programs. Through involvement in both formal advisory committees and information consultation with various agencies, a large portion of our 15,000 members have contributed to these vital activities. Indeed, as we celebrated our sesquicentennial earlier this month, the extensive role that ASA has played in the development and refinement of federal statistical programs during the past 150 years was constantly in evidence. Our interest in the future of the federal statistical system stems from our long history of commitment to it.

On behalf of the American Statistical Association, I urge you to consider favorably measures that will enhance our ability to provide sorely needed strengthening of our statistical policy and coordination efforts. As a former Director of the Bureau of the Census, I personally want you to know that I support bold steps to strengthen our capacity to define our Nation's statistical needs and to ensure that these needs are met. I trust that you will feel free to call on the ASA, and on me, as you consider this important legislation.

Sincerely,

VINCENT P. BARABBA

Attachment: COPAFS' Views on Federal Statistical Policy and the Reauthorization of the Paperwork Reduction Act.

Council of Professional Associations on Federal Statistics
Suite 402, 1429 Duke Street, Alexandria, VA 22314-3402 ● (703) 836-0404

VIEWS ON FEDERAL STATISTICAL POLICY AND THE REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT

Adopted by the
COUNCIL OF PROFESSIONAL ASSOCIATIONS ON FEDERAL STATISTICS
June 9, 1989

Background

The nation's statistical system is especially crucial in a period of rapid economic and social change, when information is needed to guide policy and legislation on such diverse areas as imports and exports, prices, productivity, banking, disease and medical care, the environment, housing, unemployment, child care, education, income distribution, taxation, crime and the judicial system--to pick just a few topics from today's newspapers. Federal statistics are the basis for representation in the United States Congress and in State legislatures; they are used to allocate billions of dollars annually among State and local governments under legislated formulas, as well as to index billions of dollars in workers' salaries and pensions. Federal statistics are also used in both the public and private sectors for market research, strategic planning, investment decisions, industrial location, and many other purposes.

The Federal statistical system is a large enterprise, spread throughout the government. Each of some 70 agencies spends $500,000 or more annually on statistical activities; in 1988, the total budget for Federal statistics amounted to $1.5 billion (exclusive of the decennial census). Data from different agencies are often used together, as in developing the national income and product estimates, and therefore must be coherent and comparable. Decisions on how to spend scarce resources should be made in ways that will advance the system as a whole.

This large and diverse set of activities requires a strong, active central statistical policy and standards office capable of coordinating the work of the statistical agencies and providing leadership to:

-- improve the quality of Federal statistics;

-- minimize the burden imposed on respondents to statistical surveys;

-- eliminate unnecessary duplication of data collection;

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American Economic Association ● American Marketing Association ● American Political Science Association ● American Psychological Association
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Association for University Business and Economic Research ● Association for Vital Records and Health Statistics ● Association of Public Data Users
Industrial Relations Research Association ● Population Association of America ● Society of Actuaries ● The Gerontological Society of America

-- ensure that each agency's data collection takes into consideration the needs of others, and that statistics from different sources are comparable when necessary;

-- keep the statistics and the concepts underlying them relevant to current needs;

-- monitor the objectivity and integrity of the data;

-- protect the privacy and confidentiality of information furnished by individuals; and

-- ensure that statistical data are accessible to the public, in a timely fashion.

To fulfill this mission requires an office possessed of authority and independence, manned by a staff adequate in number and in qualifications.

Current Status

The Federal statistical policy and standards function was carried out quite effectively for many years, but has been weakened by reduction of staff resources and by becoming subordinated to other concerns of the agency in which it has been lodged. Forty years ago the Division of Statistical Standards in the Bureau of the Budget had a staff of more than 60. Ten years ago it had half that number. Under the Paperwork Reduction Act the functions were moved downward in the organization of the Office of Management and Budget and assigned to the Office of Information and Regulatory Affairs (OIRA)--an office responsible for reviewing regulatory matters, reducing paperwork burden, clearing all administrative as well as statistical forms, developing government policy on automatic data processing and records maintenance, and ensuring privacy and confidentiality of information reported to the government by individuals. Staff and management attention have been shifted to the non-statistical functions, especially to regulatory affairs. Emphasis in statistical matters has been principally on reducing burden rather than on constructive building of the nation's statistical system. The statistical policy staff, no longer responsible for forms clearance, is down to five people.

This tiny staff is trying to monitor and coordinate a $1.5 billion activity run by 70 different agencies. It is inevitable that many urgent tasks have not been given adequate time or attention. Among these are government-wide planning and priority setting for statistical activities; evaluation of the effectiveness of current programs; review of proposed statistical budgets (now done for only a few of the largest agencies); ongoing coordination activities involving all agencies with a particular interest, rather than just a few; and periodic projects, such as updating classification systems, that require extensive consultation with many interested parties within and outside the government. The office has not yet developed government-wide standards and guidelines for statistical collection methods and presentation, as required by the Paperwork Reduction Act.

Recommendation

To ensure that the statistical policy and standards task is effectively carried out, it should have its own legislative mandate, and should be set up organizationally with a clear focus and a reasonable degree of independence.

It is recommended that the Paperwork Reduction Act or its successor legislation establish the statistical policy and standards responsibilities, now lodged in OIRA, in a separate office reporting directly to the Director of the Office of Management and Budget, under a professionally qualified Chief Statistician appointed by the President for a fixed term, and supported by an adequate staff. The responsibilities of the Chief Statistician should include, at a minimum:

-- coordinating and providing leadership for development of the statistical system, and standards for statistical work;

-- clearing statistical forms and survey methods;

-- developing policies on confidentiality of information collected from individuals or businesses;

-- eliminating unnecessry paperwork burden associated with statistical forms;

-- ensuring the integrity of the statistics;

-- actively participating in the review of statistical budgets, and, to this end, developing an annual "statistical crosscut"--a summary and analysis in the President's budget of the allocations for all statistical activities;

-- ensuring that statistical data are made available to the public in a timely manner;

-- coordinating the participation of the United States in international statistical activities, such as the development of comparable statistics; and

-- preparing an annual report to Congress on the statistical policy and coordination function.

In addition, the statistical policy office should have the opportunity to provide input into decisions on related matters, such as Federal ADP policy, records management, and clearance of administrative forms, that may affect the overall quality and availability of statistical information.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

February 1, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

Thank you for your November 6, 1989 inquiry requesting the views of the Federal Trade Commission on S.1742, the "Federal Information Resources Management Act of 1989."

The provisions of S.1742 would amend the Paperwork Reduction Act ("PRA"), reauthorize the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB"), and establish a federal Commission on Information. The amendments to the PRA focus primarily on three aspects of federal information resources management: (1) the reduction of paperwork burdens on the public, especially in federal procurement and grant programs (section 105); (2) the responsibilities of OMB and federal agencies for implementing the PRA (sections 103, 104, and 107); and (3) standards and procedures for approval of information collection requests and requirements (section 107).

Many of the changes proposed in S.1742 would not directly affect the Commission. For example, sections 103 and 104 would, among other matters, transfer certain responsibilities under the PRA from the Director of OMB to the Administrator of OIRA. Our comments address only the proposed amendments to the PRA that are most directly relevant to this agency. A brief description of the Commission's information collection programs may help place these comments in perspective.

Much of the Commission's work involves law enforcement activities that are exempt from the PRA, 44 U.S.C. § 3518(c)(1)(B) and (C). Nevertheless, we believe that the Act has had a positive effect on the FTC programs to which it applies. It has, for example, spurred the Commission's efforts in evaluating the marketplace impact of its regulatory activities. As a result of past reviews of Commission regulations, some Commission rules have been amended to reduce their burden. See e.g., 53 Fed. Reg. 31311 (August 18, 1988) (Final Rule reducing the burden of complying with the labeling requirements applicable to certain wool, fur, and textile products).

Most of the public burden attributable to Commission programs stems from federal statutes that direct the Commission to require sellers of merchandise to disclose certain information to the public. For example, the Commission has promulgated a number of rules prescribing labels for clothing, appliances, and other consumer commodities under such federal statutes as the Wool Products Labeling Act of 1939, 15 U.S.C. 68; the Fair Packaging and Labeling Act, 15 U.S.C. 1451; and the Energy Policy and Conservation Act, 42 U.S.C. 6294. These rules are deemed to constitute "information collection" under the OMB rules implementing the PRA, 5 C.F.R. § 1320. Another source of public burden arises from the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18(a). Under rules implementing that statute, parties that intend to consummate certain acquisitions and mergers are required to submit premerger notification reports to the Commission and to the Department of Justice.

The Commission occasionally conducts very limited surveys to collect information from businesses or consumers for the purpose of assessing compliance with the laws it enforces, evaluating existing programs, or studying consumer or competition issues under the general authority of the Federal Trade Commission Act. The Commission does not administer any statistical collection or publication programs, nor does it make grants. Its procurement activities are limited and do not entail any unique requirements. Specific comments on S.1742 follow.

1. Sec. 3505. Paperwork Reduction Goals and Deadlines

The provisions of S.1742 would establish a goal of reducing the burden of federal information by five percent in each of three succeeding years. The Federal Trade Commission has worked diligently to achieve the goals of the PRA and has reduced unnecessary paperwork burdens associated with its law enforcement missions. For example, the amendments to the wool, fur, and textile labeling rules cited above reduced the burden estimates for these disclosure requirements by 3.55 million burden hours. This reduction slightly exceeded 5% of the burden then attributed to the Commission. In our view, only modest opportunities remain for further reductions. Accordingly, additional burden reduction goals based on a percentage of existing activities do not appear realistic. Any significant percentage reduction in the burden now attributed to the Federal Trade Commission would require the elimination of disclosure requirements that are either required by law or are serving an appropriate function in the marketplace.

To ensure that agencies continue to strive for reduced paperwork burdens, it would be preferable to focus on the specific annual increases and decreases in burden and benefit resulting from existing, new, and discontinued information collection programs. Such a focus would emphasize developing a strategy for minimizing paperwork burdens within the context of the entire agency program.

2. Sec. 3506. Federal Agency Responsibilities

The provisions of S.1742 require each federal agency to appoint a "Chief Information Resources Management Official" who would be subordinate to the senior official for information resources management (IRM) currently serving at each agency. It appears that the amendments would allow both functions to be assumed in any given agency by a single person. Section 106(2)(A). This flexibility might be important for small agencies such as the Federal Trade Commission because it would permit more efficient use of Commission resources.

The provisions of S.1742 would also modify the existing scheme of agency responsibilities under Section 3506 of the PRA by specifying in greater detail the appropriate management procedures for disseminating information to the public. Specifically, S.1742 would require agencies to maintain public files on all PRA submissions to OMB and to ensure that information collection proposals are independently reviewed before submission to OMB. Further, the bill seeks to ensure that paperwork requests and related instructions are written clearly enough to be understandable to the target audience. We regard these as appropriate goals under the PRA.

3. Sec. 3507. Approval and Delegation of Information Collection; Self-Certification Process

The provisions of S.1742 would modify the process of submitting information collection requests to OMB in several salient respects. First, submissions would be required to include estimates of the benefit to be gained from the proposed activity, as well as the paperwork burden imposed. Estimation (as opposed to quantification) of the expected benefits from a proposed activity should not involve much greater effort than do submissions to OMB under the present PRA scheme. Such submissions currently must demonstrate the need for and practical utility of the proposed activity.

The provisions of S.1742 would also remove the three-year limitation on OMB approvals for the collection of information required by a rule. This would add useful flexibility to the PRA. Not every collection of information required by rule will necessarily require reconsideration at three-year intervals.

Finally, S.1742 would delegate to agency heads certain authority to review, with public input, information collections that have been approved previously by OMB and to certify their continued need. As we understand this section, it would permit agency self-certification of previously approved information collections, including those required by Commission rules and those not required by rule, such as surveys to collect information from businesses or consumers. The delegation of review authority to the agencies for previously approved information collections is appropriate, given the experience agencies have gained under the PRA, and we support such delegation.

By direction of the Commission.

Janet D. Steiger
Chairman

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

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February 20, 1990

Mr. Leonard Weiss
Staff Director
Senate Committee on Government Affairs
Room: SD 430 Dirksen Senate Office Bldg.
United States Senate
Washington, DC 20510

Dear Len:

In order to clarify and add some specifics to the broader conversations we have had with you regarding our contention of O.M.B.'s misuse of the Paperwork Reduction Act -- I am sending along a copy of our suggested corrective language. It is drawn to the House bill. Obviously, we would urge its incorporation to your bill, as well.

Sincerely,

Jay Power

Jay Power
Legislative Representative
DEPARTMENT OF LEGISLATION

JP/dm
Enclosure

MEMORANDUM ON AFL-CIO PROPOSED CHANGES IN THE CONYERS/HORTON PAPERWORK REDUCTION BILL

1. The bill fails to address one of the most serious problems that has developed under the Paperwork Reduction Act: namely, OMB's efforts to countermand safety and health regulations promulgated after full rulemaking by agencies such as the Occupational Safety and Health Administration on the ground that the regulations involve "paperwork" requirements. Although we believe that OMB's efforts in this regard violate the PRA as that law presently stands, OMB obviously disagrees with our view, and it is therefore important to make the statute more explicit on this point.

We propose the following provision, to be inserted at page 32, line 21 of the bill, in section 106(c) ("Director's Review of Information Collection Requests Contained in Rule"), which amends 44 U.S.C. § 3507(c):

> "(10) Notwithstanding any other provision of this chapter, the Director shall have no authority to disapprove any information collection request contained in a rule to the extent that the information collection request requires the dissemination of information to any member of the public for the purpose of protecting his or her safety or health."

This provision is quite narrow. It is limited to requirements which (i) have the purpose of protecting safety and health and (ii) are promulgated after rulemaking. And, because the provision forbids OMB disapproval only to the extent that the information collection request requires the dissemination of information to members of the _public_, it would not bar OMB from disapproving any requirement that information be provided to a _federal agency_.[1]

2. There is an important technical defect in section 102 of the bill, at page 6, line 19, in the definition of "information collection request contained in a rule" (to be codified at 44 U.S.C. § 3502 (18)). As drafted, the definition provides that an information collection request is entitled to the special treatment accorded to requests "contained in a rule" only if the request was "subject to notice and comment procedures _under section 553 of title 5, United States Code_" (emphasis added).

Several regulatory statutes do not incorporate by reference section 553 of title 5, but contain their own rulemaking procedures that are comparable to, and sometimes virtually identical to, those found in section 553. Regulations promulgated pursuant to such procedures are no less "rules" than those promulgated pursuant to section 553 itself. Accordingly, the following words should be added at the end of line 19 at page 6: "or under other provisions of law or regulation requiring that rules be made on a record after notice and comment."

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[1] The intent of the proposed provision is that if an information collection request requires a person to provide information both to the public and to an agency, OMB has authority to disapprove the requirement that the information be submitted to the agency (assuming, of course, that such disapproval is proper under the other applicable provisions of the Act), but has no authority to disapprove the requirement that the information be provided to the public--even if the two requirements are contained in a single regulatory provision. In such a case, OMB's determination whether to approve the requirement of submission of information to the agency should be based exclusively on the _additional_ burdens and benefits involved in providing the information to the agency, beyond whatever burdens and benefits are involved in providing the information to the public. These implications of the proposed provision should be made clear in report language.

3. The provision requiring OMB to maintain a public record for information collection requests under review (section 104(a) of the bill, at pp. 13-15, to be codified at 44 U.S.C. § 3505(b)) should be strengthened. For example, as drafted this provision does not require a record of contacts between the Office of Information and Regulatory Affairs and persons outside the Office except where a contact takes the form of "written correspondence."[2/] The recent administrative agreement with respect to OMB's review of agency rules pursuant to Executive Order No. 12291 requires more than the bill requires in this regard. We submit that the bill's provisions on this point should be at least as comprehensive as the corresponding provisions in the administrative agreement.

[2/] In addition, the provision does not require OMB to maintain a public record of submissions from OIRA to the agency that has made the proposed information collection request, but only from the agency to OIRA. The former submissions may generally be contained in the public record maintained by the requesting agency pursuant to the provision at page 25 of the bill, but it is desirable that OMB include such materials in its own public record.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

LANE KIRKLAND
PRESIDENT

815 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

THOMAS R. DONAHUE
SECRETARY-TREASURER

LEGISLATIVE ALERT!

(202) 637-5075

March 21, 1990

Honorable John Glenn, Chairman
Senate Committee on Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to state the AFL-CIO's support for S. 1742, the legislation to reauthorize the Paperwork Reduction Act (PRA) and related purposes, which was introduced by Senator Bingaman and which is presently being considered by the Committee on Governmental Affairs.

The 1980 Paperwork Reduction Act was enacted to reduce unnecessary and burdensome requirements to report information to the federal government. The AFL-CIO supports that objective but, based on the experience of the last 10 years, the Federation has concluded that legislation is needed which reauthorizes the PRA, opens up OMB regulatory review procedures to greater public view and establishes reasonable time frames for such review.

During the past 10 years, the Office of Management and Budget (OMB) has repeatedly overstepped its PRA authority and improperly interfered with important government regulations, particularly those concerning safety and health of workers and the public. See, for example, Dole v. Steelworkers, ___ U.S. ___ (Feb. 21, 1990), where the Supreme Court ruled that OMB had acted beyond its authority in disapproving provisions of OSHA's Hazard Communication Standard which require that workers be informed about toxic chemicals on the job.

The AFL-CIO believes that S. 1742 -- which continues OMB's authority to check unnecessary government information demands, requires that communications with OMB on regulatory review and paperwork matters be made public and establishes improved review procedures -- is sound legislation. We therefore urge you to support S. 1742 without any weakening amendments.

Sincerely,

Robert M. McGlotten

Robert M. McGlotten, Director
DEPARTMENT OF LEGISLATION

c: Members of Senate Government Affairs Committee

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

FEB 21 1990

Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510-6250

Dear Mr. Chairman:

I am pleased to respond to your request for comments on S.1742, the proposed "Federal Information Resources Management Act of 1989."

Among its provisions, the bill would require all agencies to create a new organizational unit, which must be independent of all program offices. The new unit would conduct a detailed analysis of each information collection activity proposed by the agency. With respect to ongoing information collections which must be submitted to OMB for re-approval every three years, the new unit would certify to OMB's Office of Information and Regulatory Affairs that the activity continues to be necessary for the performance of the agency's functions, and is not duplicative or unduly burdensome. The bill also requires that all regulatory information collection renewals and all new or modified, non-regulatory information collections be submitted directly to OMB for approval.

This internal review process would impose additional staff and budget requirements on the Commission. In addition, such a new organizational unit would not likely be fully utilized given the small number of public information collections which we sponsor. Further, while self-certification presumably would provide agencies more autonomy in reviewing and approving their ongoing, non-regulatory information collections, the bill also affords OMB the authority to review and challenge the agency's self-certification at any time. This open-ended provision for OMB's review of the self-certification process could interfere with the timely development of the agency's independent policy and rulemaking objectives.

For these reasons, we believe that the internal review and self-certification process would not be advantageous or efficient for small agencies such as the Commission. We, therefore, recommend that the mandatory internal review process in the bill be deleted or amended to allow smaller agencies such as the FCC the option to continue their current practice of submitting all information collection activities to the OMB for its review.

Moreover, the proposed extension of the OMB rule review period from the current 60 days to 90 days for "major" rules could be detrimental to the rulemaking process. The terms "major" and "nonmajor" are not defined in the bill, and it is unclear as to whether the agency or OMB would determine this classification. I believe any lengthening of the process would be contrary to the best interests of regulated industries and the overall Paperwork Reduction Act goal of reducing public burden.

The Commission's commitment to the goals of the current Paperwork Reduction Act is evidenced by the numerous measures we have undertaken to reduce the information collection burden imposed on the public. Our effective program in this area has enabled the Commission to achieve one of the best records in the federal government for compliance with the Act. The implementation of the additional requirements proposed in the pending bill, however, may require the allocation of further resources to comply with these changes. Due to continued budget constraints, it would be difficult for this agency to absorb any additional resource requirements at this time.

Thank you for an opportunity to provide comments on this legislation.

Sincerely,

Alfred C. Sikes
Chairman

FINANCIAL EXECUTIVES
INSTITUTE

STATEMENT OF

SIDNEY SPENCER
ON BEHALF OF THE

COMMITTEE ON GOVERNMENT LIAISON
OF THE
FINANCIAL EXECUTIVES INSTITUTE

FEBRUARY 22, 1990

BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE

REGARDING
RAUTHORIZATION OF THE
PAPERWORK REDUCTION ACT

1100 Seventeenth Street, N.W.
Suite 1205
Washington, D.C. 20036
(202) 659-3700

I. FINANCIAL EXECUTIVES INSTITUTE

Mr. Chairman, the Committee on Government Liaison of the Financial Executives Institute appreciates this opportunity to express our thoughts on the reauthorization of the Paperwork Reduction Act and the Office of Information and Regulatory Affairs at the Office of Management and Budget. We compliment you for initiating the dialogue on the reauthorization of the Paperwork Reduction Act and for showing leadership by seeking comment on S. 1742.

We believe that reducing the burden of government paperwork on Americans should be the primary mission of the Office of Information and Regulatory Affairs. This is an important step to help ensure that America remains competitive in world markets. FEI's Committee on Government Liaison strongly supports the reauthorization of the Paperwork Reduction Act and encourages the Senate Committee on Governmental Affairs to promote a strong Office of Information and Regulatory Affairs to enforce the Act.

Financial Executives Institute, the leading advocate for corporate financial management, is a professional association comprised of 13,000 individual members who are senior financial and administrative officers in 7,000 business organizations throughout the United States and Canada. The Committee on Government Liaison is authorized to formulate statements and positions on federal legislative and regulatory proposals that are relevant to the responsibilities and interests of the financial executive.

As corporate financial executives, we are the users of many of the government's statistical services, such as market research, economic analysis, and projections. We are also providers of much of the raw data on which such statistics are based. Thus, we have a direct interest in the quality of the system's outputs and inputs. As taxpayers, we are concerned that government policy decisions be based on accurate and timely data. Inaccurate or untimely data could result in economic losses to the nation.

We believe that Congress had several objectives when enacting the Paperwork Reduction Act. These include: (1) minimizing the federal paperwork burden for individuals, businesses, state and local governments, and other segments of the public; (2) minimizing the cost to the federal government of obtaining information necessary for the proper performance of federal agency functions; and (3) maximizing the usefulness of information collected. These objectives are of great import to our members.

It is our general position that: (1) the Paperwork Reduction Act is a generally sound piece of legislation; and (2) OIRA has been, and can continue to be, effective in providing necessary central management and coordination in implementing the objectives of the Paperwork Reduction Act. We applaud efforts by those to reauthorize the current law and believe that the focus of these hearings should be on reducing the burden and improving the quality of government information.

II. BIPARTISAN SUPPORT FOR PAPERWORK REDUCTION

Improvements have been made as a direct result of the current law particularly in the last few years. For example, recognition by the Internal Revenue Service that its burden estimates for forms have historically been understated and its willingness to seek more dialogue with the public on tax administration matters are welcome but long overdue reforms.

The historical combination of bipartisan Congressional support for the Paperwork Reduction Act combined with aggressive enforcement by the Office of Information and Regulatory Affairs provides a "carrot and stick" to agencies wishing to mandate government information requests. Without continued support for the Paperwork Reduction Act with central enforcement in the Office of the President, federal agencies have carte blanche to expand the burdens imposed on the private sector. Private sector organizations willing to offer constructive commentary on developing informational requests will have no audiance. Few restraints will hold federal agencies back.

To this date, support for reducing burdens on Americans have been bipartisan. After all, it was President Jimmy Carter in 1980 who stated:

> "The Act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public."

III. REAUTHORIZATION PROPOSAL

We appreciate the opportunity to discuss S. 1742. We do support certain provisions in this bill which, we feel, could help strengthen the Paperwork Reduction Act. These includes efforts to: (1) make Government information more readily available to the public; and (2) more fully use electronic data systems to collect, store, and disseminate information.

Of course, Mr. Chairman, we do have several concerns with the proposed reauthorization bill that I would like to also highlight. We offer these recommendations in a constructive tone and would be willing to work with your staff to fashion useful compromises. These concerns include the:

(1) Potential expansion of the definition of "practical utility" through the need to "ensure the greatest possible public benefit" of information collected.

(2) Introduction of agency "self-certification" effectively removes the current three year automatic review requirement under current law.

(3) Restrictions on OMB's ability to question underlying policy decisions and the replacement of skilled OIRA cost-benefit economists with computer and library science disciplines.

(4) Reauthorization of the Paperwork Reduction Act is limited to two years -- we recommend five years with no major changes.

We believe, Mr. Chairman, that the debate over reauthorization of the current law should center on burdens imposed on the private sector and the quality of government statistical data. In toto, S. 1742 seems to send a signal to the agencies that Congress is less concerned with the paperwork burden imposed on Americans than when the original Paperwork Reduction Act was passed in 1980.

IV. FEI RECOMMENDATIONS

We believe that, while not flawless, the current law has been effective in forcing agencies to consider the paperwork burdens imposed by their information requests. We should focus our energies today upon improving the means by which we collect and assimilate this data collected.

We recommend a reauthorization period for the present Paperwork Reduction Act of five years. Congress can still effectively perform its oversight responsibilities through the confirmation of the OIRA Administrator and the funding of OIRA activities. It is our belief that reauthorization of less than five years is unlikely to yield the results intended by the Act.

United States Government Printing Office

FEB 15 1990

Honorable John Glenn
Chairman, Committee on Governmental Affairs
U.S. Senate
Room 340, Dirksen Office Building
Washington, DC 20510-6250

Dear Mr. Chairman:

I would like to convey my views on S. 1742, the Federal Information Resources Management Act of 1989, which was introduced by Senator Jeff Bingaman on October 6, 1989. I understand that the Committee on Governmental Affairs plans to hold hearings on this bill on February 21 and 22, 1990.

S. 1742 would reauthorize the Paperwork Reduction Act of 1980 (P.L. 96-511, as amended), which is included in chapter 35 of Title 44, U.S. Code. Although the Government Printing Office (GPO) is not covered by the Act, our attention has been drawn to the reauthorization process by the inclusion in the bill of provisions establishing statutory guidelines to be followed by the Office of Management and Budget (OMB) in the issuance of policy directives concerning information dissemination by Federal agencies.

GPO Programs and Services. GPO's statutory responsibilities, as authorized by the public printing and documents chapters of Title 44, include the provision of cost-effective information reproduction and dissemination programs and services for Congress, Federal agencies, and the public. Where information reproduction is concerned, sections 501 and 502 of Title 44 require GPO to provide printing and binding services for Congress, Federal agencies, and the Judiciary through in-house production and commercial procurement.

With regard to information dissemination, section 1701 of Title 44 provides that "publications for public distribution [are] to be distributed by the Public Printer." The law further provides for the sale of publications to the public by GPO's Superintendent of Documents [section 1702]; sets the price of documents for sale to the public and prescribes the terms and conditions for resale [section 1708]; assigns the responsibility for indexing and preparing a catalog of Government documents to the Superintendent of Documents [sections 1710 and 1711]; and provides for the distribution by the Superintendent of Documents of Government publications to foreign libraries, under the administration of the Library of Congress [section 1719]. In addition, Title 44 establishes that Government publications of value to the public are to be distributed by the Superintendent of Documents to depository libraries [section 1902].

OMB Information Policy Issuances. To date, OMB policy issuances on information dissemination, as contained in OMB Circular No. A-130, "Management of Federal Information Resources" (December 12, 1985), and in the attempt last year to update Circular No. A-130 with guidance on electronic information dissemination ["Advance Notice of Further Policy Development on Dissemination of Information," 54 Federal Register 2 (January 4, 1989), pp. 214-220], have not, in our opinion, been firmly grounded in the language of the Paperwork Reduction Act, although both cited the Act as the basis for their authority. While one purpose of the Act is to "minimize the cost" and "maximize the usefulness" of information disseminated by the Government, the Act, as you know, is most commonly associated with OMB's paperwork clearance process, and indeed was passed primarily to reduce the Federal paperwork burden on "individuals, small businesses, State and local governments, and other persons." Little guidance relevant to Federal information dissemination policy is found in the current statute.

In our view, the absence of such statutory guidance has led to a misapplication of Congressional intent where GPO's Title 44 responsibilities are concerned. While Circular No. A-130 purports to assist agencies in "[performing] their information management activities in an efficient, effective, and economical manner," it contains no reference to GPO's programs and services, with the exception of a brief reference to the requirements of the Depository Library Program. The "Advance Notice" similarly ignored GPO. In response, we provided comments on Circular No. A-130 which included an offer of GPO assistance to OMB to help assure the cost-effectiveness of agency dissemination programs.

We also provided comments on the "Advance Notice." To date, however, we have no indication that any further revision of Circular No. A-130 will include policy guidance to agencies to utilize GPO's programs and services to the extent required or authorized by law.

Comparison of S. 1742 and H.R. 3695. Both S. 1742 and its companion House bill, H.R. 3695, the Paperwork Reduction and Federal Information Resources Management Act of 1989, include language that would provide OMB with specific statutory authority to issue policy guidance on information dissemination. We agree wholeheartedly with the need for such authority. However, S. 1742 lacks the specificity of H.R. 3695 with regard to GPO's Title 44 programs and services. While we believe that the requirements of S. 1742 represent a significant improvement over current law, in the absence of such specificity we are concerned that future OMB information dissemination policy issuances will fail to make adequate reference to GPO, based on prior OMB practice.

Among other things, section 103(c) of H.R. 3695 provides that any information dissemination policy guidance issued by OMB must:

(1) supplement and not replace the provisions of the public printing and documents chapters of Title 44;

(2) require agencies to provide to the Superintendent of Documents, for distribution to the Depository Library Program, all Government publications required by chapter 19 of Title 44 to be made available, including publications in electronic formats; and

(3) require agencies to utilize GPO for the production and dissemination of information products and services, to the extent provided by Title 44.

By comparison, section 104(e) of S. 1742 provides only that any guidance issued by OMB "be developed in consultation with central information management agencies possessing governmentwide dissemination authority under law." Under section 106, agencies are required to "provide to the Superintendent of Documents for distribution to the Federal Depository Library Program all publications required by chapter 19 of [Title 44] to be made available." We think these provisions can be improved.

Information Dissemination Authority. With regard to section 104(e), we request that you include, either in the bill itself or in the legislative history of the section, a clear indication that Congress intends "central information management agencies" to include GPO, and that, in GPO's case, "governmentwide dissemination authority" applies to programs and services authorized by chapters 17 and 19 of Title 44.

Further, under the provisions of section 106 concerning the information dissemination responsibilities of chief information resources management officials, we request that you include reference to GPO's other statutory information dissemination programs, including the Sales of Publications, Statutory Distribution, Reimbursable Distribution, Cataloging and Indexing, and International Exchange Programs. These could be included either in the language of the bill or in the legislative history of the section.

Information Reproduction Authority. We also request that you include reference in S. 1742 to GPO's authority to provide information reproduction services, under the public printing chapters of Title 44. Three pertinent areas of the bill--section 101 at subparagraphs (8) and (8)(D), section 104(e), and the language under section 106 requiring chief information resource management officials to "establish and maintain an information dissemination management system"--do not make any reference to the "reproduction" of Government information through printing, related graphic arts, and electronic measures. The absence of any reference to information reproduction, which is a major component of the information life cycle concept, and which is a primary GPO responsibility, was a major failing of previous OMB information policy issuances.

Depository Library Program. With regard to the section 106 provision pertaining to the Depository Library Program, we urge you to include language specifying the inclusion of publications in electronic formats. OMB has taken the position that the definition of "publication," as used in chapter 19 of Title 44, does not include information in electronic formats. The Government's continuing shift from ink-on-paper to electronic formats, however, may reduce the flow of documents to depository libraries unless adequate provisions are made for electronic depository dissemination. We believe such action is necessary to avoid undermining the efficacy of the Depository Library Program and appropriations made for that purpose. In addition, electronic dissemination is necessary to provide for the increasing capability of depository libraries to make Government information in electronic formats available to their users, to meet the growing public demand for access to information in these formats, as discussed in the Office of Technology Assessment (OTA) report, Informing the Nation: Federal Information Dissemination in an Electronic Age (October 1988).

Under the direction of the Joint Committee on Printing (JCP), and with the agreement of the Committees on Appropriations, in 1988 GPO initiated a series of pilot projects to evaluate the feasibility and costs of disseminating electronic products and services to depository libraries. The projects were reviewed in the OTA report and were discussed in testimony last year before the Committees on Appropriations, the House Subcommittee on Procurement and Printing, and the House Subcommittee on Government Information, Justice, and Agriculture.

In a related development, GPO's authority to disseminate information in electronic formats to depository libraries was reviewed in an opinion of GPO's General Counsel, dated May 23, 1989. The opinion focused specifically on the definition of "publication" currently found at section 1901 of Title 44. It found that the definition ("informational matter which is published at Government expense, or as required by law") embraces information in electronic formats, inasmuch as the definition itself turns on the issue of whether the "informational matter" is published for public consumption by the Government. Thus, the inclusion of language in S. 1742 specifying that publications distributed to depository libraries include publications in electronic format would provide explicit reference to current GPO authority and dissemination practice.

Standards-Setting. We have reservations about those aspects of the S. 1742 regarding standards, under section 104(e). The OTA study recommended that GPO take a leadership role in establishing and promoting the use of governmentwide database standards for information reproduction and dissemination. S. 1742, however, would assign all standards responsibilities to the National Institute of Standards and Technology (NIST), which is authorized to issue uniform technical standards "after consultation with the public and appropriate agencies." OMB subsequently would encourage and monitor the use of such standards through information policy guidance.

This part of the bill could have a major impact on GPO's operations, because it would provide NIST and OMB with the ability to determine GPO's future equipment, systems, and procedural requirements by mandating the standards that GPO's customer agencies would have to use. Without significant GPO participation in the standards-setting process, a system of standards could result that would require a major capital investment program by GPO, in combination with substantial workforce, staffing, training, and recruitment impacts. Accordingly, we request that you include, either in the bill itself or in the legislative history of section 104(e), an indication that GPO is to be specifically consulted in the development of any standards by NIST that would impact GPO's information reproduction and dissemination programs.

Commissions. We also respectfully request that you consider the inclusion of the Public Printer and the Superintendent of Documents as members of the Advisory Committee on Information Policy, to be established by section 111, and the Commission on Federal Information, to be established by Title II of S. 1742. Because of their statutory responsibilities, these officials are ideally suited to provide these bodies with a significant range of valuable information and advice on Federal information reproduction and dissemination issues.

Notwithstanding the various changes we have suggested, on the whole we believe S. 1742, in combination with H.R. 3695, represents a significant step forward in ensuring that future OMB information policy issuances adequately address GPO's programs and services. Accordingly, we would be pleased to provide you with any further assistance you may require to secure the successful passage of this important legislation.

Sincerely,

JOSEPH E. JENIFER
Acting Public Printer

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON D.C. 20416

February 23, 1990

Senator John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the statement of Susan Engeleiter, the Administrator of the Small Business Administration concerning S. 1742, the "Federal Information Resources Management Act of 1989."

The statement sets forth the views of the agency from the perspective of both the small business community and the Small Business Administration. The Administrator would be pleased to have this statement inserted in the hearing report.

Thank you for your assistance.

Sincerely,

Michael P. Forbes
per cam

Michael P. Forbes
Associate Administrator for
Congressional and Legislative Affairs

SBA U.S. Small Business Administration Washington, DC 20416

STATEMENT OF
SUSAN ENGELEITER
ADMINISTRATOR
U.S. SMALL BUSINESS ADMINISTRATION
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE
FEBRUARY 21, 1990

Mr. Chairman, I am pleased to take this opportunity to share the views of the U.S. Small Business Administration on S. 1742, the "Federal Information Resources Management Act of 1989," which reauthorizes the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 et seq. As your Committee considers modifications and improvements to the PRA, I urge you to recognize the significance of this piece of legislation to its intended beneficiaries.

The Small Business Administration has assessed this proposed legislation from two perspectives: that of a federal agency with information collection needs and that of an advocate on behalf of the small business community. It is SBA's conclusion that the

PRA has been an important protection for small businesses from the burdens of information collection. While the SBA believes reauthorization of the PRA is essential to minimize the government recordkeeping and reporting requirements imposed upon small businesses, such action should be taken in a manner which allows the agencies to engage in information collection activities necessary to their operations.

By the end of the last decade, the cost of doing business had increased dramatically as a result of an explosion of federal regulation during the 1970s and the concomitant compliance costs, which are borne disproportionately by small business. Thus, the reduction of the burdens imposed on small business from federal regulation was identified as a top priority item by the 1980 White House Conference on Small Business.

Both the legislative and executive branches recognized the tremendous paperwork burdens imposed by the complexity of federal regulations. The bipartisan legislative response was the enactment of the PRA, which took effect on April 1, 1981. It was primarily designed to reduce both the amount of paperwork that business would be required to generate and maintain and to limit recordkeeping requirements.

The paperwork reduction process established by the PRA has two essential elements. First, a regulatory agency must justify both the necessity and practical utility of a proposed paperwork requirement before imposing it on small business and the public. Second, and equally important, the agency must periodically -- at least every three years -- reexamine its paperwork burdens to see if they continue to be necessary and of practical utility in light of subsequent experience or changed circumstances. In both instances OIRA plays a critical oversight and approval role.

A recent General Accounting Office report examined these procedures and found no particular deficiency in the present statutory scheme. GAO/PEMD-89-20 (September 1989). Indeed, the report serves to highlight the importance of PRA review of regulation-based paperwork requirements in general, and of the periodic reapproval of existing regulation-based paperwork requirements in particular.

Of the 20,497 information collection requests submitted to OIRA between 1982 and 1987, fully 67 percent, or 13,788, were from regulatory agencies. Of these, 10,015 or 73 percent entailed reapproval of recurrent or previously approved collections, and only 3,773 or 27 percent were new. OIRA subsequently approved 91% of the new collections and 96% of the recurrent collections. This particularly high rate of approval of existing regulatory burdens should not be surprising since most are truly necessary. However, it is important to maintain the coordinated periodic review process to ensure the continued need for and updating of federally-imposed requirements.

Under the scheme for OMB review contained in the statute in its present form, agencies must obtain periodic OMB clearance of their collection of information requirements. In cases where OMB finds that an agency has acted unreasonably by seeking continuation of requirements which lack the requisite necessity or practical utility, OMB may assert its disapproval authority. Through this mechanism, the public is assured a periodic assessment of the continued need for information collection activity.

As you know, this is particularly complex legislation which spans a broad range of information collection, management and statistical policy issues. SBA has two areas of concern to express with respect to S. 1742. The first is from the perspective of the administrative operation of the SBA, and, as discussed below, focuses on two provisions which would be difficult for the Agency to implement while continuing to achieve its program goals. The second area of concern pertains to the ability of the Office of Information and Regulatory Affairs (OIRA) to review information collection requests.

Agency Information Management Concerns Should be Addressed

In respect to the administrative operation of the SBA, the first of the two provisions I wish to mention is Section 106, which would amend 44 U.S.C. 3506(b) by creating a new Chief Information Resource Management Official who would be responsible for conducting new certification and review procedures. Under the present PRA, an existing agency information official is charged with coordinating and reviewing agency information collection requests. SBA believes that S. 1742 would create administrative confusion by splitting the functions of the present agency information officer into two separate positions.

The second provision I wish to mention is Section 105, which would continue the statutory requirement that government agencies reduce their paperwork burden by 5% annually. While percentage reduction goals were appropriate in 1980 when the PRA was enacted, they are no longer feasible because Congress continues to pass legislation which increases the agencies' paperwork burden. A recent example is the new anti-lobbying statute contained in section 319 of Pub. L. 101-121, the Appropriations Act for the Department of the Interior. Arbitrary reduction goals such as this are the major reason that program managers try not to include their information collection requests in their agency's Information Collection Budget. Furthermore, unrealistic goals have served as a hindrance to the institutionalization of the budget within the agencies. Finally, the Small Business Administration has been successful in the past several years in reducing its paperwork burden to the minimum level necessary for the continuation of program benefits. Further reduction may prove inadvisable if the SBA is to ensure that its programs continue to be properly administered.

The Present Standard for Periodic Review of Rule-Based Paperwork Burdens Should Not Be Weakened

A second concern is that the bill would undermine OIRA's authority to periodically review and approve paperwork requirements contained in the many thousands of existing rules to assure their continued necessity. It would at the same time remove much of the incentive that the regulatory agencies now have to overcome institutional inertia and take a fresh look at whether yesterday's rules actually address today's problems.

S. 1742 would dramatically hinder OMB's effectiveness when reviewing collection of information requirements in existing rules during periodic review by changing the standard of review. Under the statutory language in the proposed Section 3507(j), if an agency seeks to continue an information collection activity unchanged, OMB has no alternative but to approve the continuation, unless OMB finds that the agency's decision "on continuing the collection activity was _arbitrary and capricious_." (emphasis added.) Thus, OMB's periodic review of the continued necessity and practical utility of information collection requirements would be reduced to review in which its role is effectively diminished to approving _pro forma_ the continuation of an agency's collection of information requests because of the strenuous "arbitrary and capricious" standard. Thus, an agency may even be acting in good faith -- neither arbitrarily nor capriciously -- but may be seeking the continuation of collection of information requirements which are no longer necessary or useful.

OMB's role of assuring the necessity and practical utility of information collection requests is just as valid during subsequent review as it is during initial review. There is no justification for application of a different standard for the periodic review of requirements in existing rules. Congressional intent would be undermined by this unwarranted change, as would the integrity of the institutional safeguards embodied in the PRA. The proposed statutory change would deny to OMB the opportunity to examine and consider information collection activity, approved during its initial review, in light of newly acquired information and experience. In essence, the proposed change would place with the agency that wishes to continue to impose requirements the authority to do so with impunity.

In sum, adoption of a new, more stringent and untested standard would focus any inquiry away from that which Congress intended: the assurance of reasonable, practical and necessary federally-imposed information collection activity. Limiting OIRA action to situations where an agency has acted in an "arbitrary and capricious" manner would hinder and alter the efficacy of the regulatory oversight process. I can see no justification for this great deviation from the original standard. Thank you for your consideration of the views of the U.S. Small Business Administration on this important legislation.

HEWLETT-PACKARD COMPANY
1501 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304

DAVID PACKARD
CHAIRMAN OF THE BOARD

February 14, 1990

The Honorable John Glenn, Chairman
Committee on Governmental Affairs
SD-340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Glenn:

As you know, I have long advocated streamlining and simplifying the processes of government. I hold these views not only as an American businessman, but from the perspective as well of one who has served in a managerial role in our government.

The Paperwork Reduction Act, as enacted in 1980 and most recently reauthorized in 1986, represents a critical weapon in the war on inefficiency and waste in government. It also represents perhaps the most valuable avenue available to the public to have an impact on the burdens the government imposes on its own citizens.

In the President's Blue Ribbon Commission on Defense Management, we found that to improve the efficiency of its procurement activities the government must increase its reliance on commercial products and services. However,in order to achieve this cost-effectiveness objective, significant impediments must be removed from the federal procurement process. Those impediments are concentrated in the government's insistence on extensive, intrusive reporting of highly sensitive proprietary information by our nation's commercial companies, large and small. These demands have a damaging regulatory effect which not only skews the efficiency of our procurement system, but weakens our defense industrial base and contributes to our nation's competitiveness problems in the world economy.

I would like to renew the recommendation of our Commission for your serious consideration, that the government should increase its reliance on competition as its best protection on price, and turn its efforts away from imposing artificial administrative and accounting burdens which distort and impede the process.

I encourage you to reauthorize the Paperwork Reduction Act in a manner that clearly retains its underlying principles. I further urge that you seize this legislative opportunity and address specific paperwork relief to the government-wide processes of federal procurement of commercial products.

Sincerely,

David Packard

HEWLETT
PACKARD

Bernie McKay
Manager, U.S.
Procurement Policy

Dr. Weiss —

Please find attached a copy of the commercial product procurement amendment to which Stu Eizenstat referred in his testimony, and to which Dave Packard referred in his letter.

I hope this is helpful.

Bernie McKay

AMENDMENT

Section ____ REDUCTION OF PAPERWORK IN THE ACQUISITION OF COMMERCIAL PRODUCTS

(a) Within six months of the date of enactment of this Act, OFPP shall develop and the Federal Acquisition Regulatory Council shall promulgate in regulation a new, simplified form of contract to be used by all Federal agencies for the acquisition of commercial products.

(1) The new form of contract shall contain terms normally used in the purchase and sale of commercial products, such as standard terms from the Uniform Commercial Code, to the extent consistent with the needs of the Government and include only those clauses required by federal statute applicable to the acquisition of commercial products.

(2) Paragraph (1) notwithstanding, the new form of contract shall not exclude clauses mandated for inclusion in particular procurements by other statutes.

(b) Within six months of the date of enactment of this Act, the OFPP shall develop and the FAR Council shall promulgate regulations, including revisions of current regulations, which state that:

(1) The regulatory exemption from the requirement for submission of cost or pricing or sales data from offerors, contractors, and subcontractors on the basis of adequate price competition shall be satisfied in commercial product procurement actions utilizing "competitive procedures," as defined in 41 U.S.C. Sec. 403, or when based on such competition under similar terms and conditions, or when prices have been set by law or regulations.

(2) For commercial product procurement actions utilizing other than "competitive procedures" or when the procuring agency fails to obtain responsive offers from two or more responsible offerors competing independently.

A. the contracting officer shall determine if the price is reasonable based on price analysis, including comparison to prices from federal supply schedules under the authority of the General Services Administration for the same commercial product; or

B. if a product is not on a federal supply schedule, the contracting officer shall determine the reasonableness of the proposed price, according to the following order of precedence:

(i) the contracting officer shall determine if the price is reasonable based on price analysis, including comparison to federal supply schedule prices for similar commercial products;

(ii) if no federal supply schedule exists for similar commercial products, the contracting officer shall perform market research and ascertain comparative market prices through established industry publications, other existing federal government price agreements, or other research sources for the same or similar commercial products from competing vendors;

(iii) if the contracting officer is unable to determine the reasonableness of the proposed prices after completing bona fida attempts to ascertain comparability of prices available to the general public market or federal government, the offeror, contractor or subcontractor shall submit a claim for exemption from submission of certified cost and pricing data consistent with P.L. 87-653.

C. In conducting price analysis under paragraph (b), the contracting officer shall consider the impact on price reasonableness of the differing terms, conditions, requirements and quantities set forth in the agency's procurement solicitation.

(3) In preparation for or during the conduct of price analysis or negotiations by the government for commercial product procurement actions, any request for such data submissions about the commercial product from offerors, contractors or subcontractors shall be limited to data about directly pertinent general public market sales, the terms and conditions of which are comparable to the contractual relationship that would exist in the contemplated federal government contract.

(c) Within six months of the date of enactment of this Act, the Administrator of OFPP shall develop and provide policy guidance to Federal agencies emphasizing that requirements in commercial product solicitations shall be stated in the form of functional requirements rather than design specifications.

(d) Nothing in this Section shall excuse an agency from compliance with other statutes, including those requiring competition in Federal government contracting.

(e) Within six months of the promulgation of the regulations required by this Section, the Administrator of OIRA shall complete a review of the paperwork requirements pertaining to the acquisition of commercial products and shall report its findings and recommendations to the Office of Federal Procurement Policy, the House Committee on Government Operations and the Senate Committee on Governmental Affairs. Such review and report shall include examination of such paperwork requirements for consistency with the provisions of this Section.

(f) DEFINITIONS: In this Section, the term

(1) "Commercial product" means a product, such as an item, material, component, subsystem, system or service which is or has been offered for sale or traded to the general public market in the course of normal business operations, including new, modified, discontinued products and products derived from or based on such products where differences can be determined by price analysis of similar products.

(2) "Similar products" means other commercial products, offered by any vendor, which are considered by general public markets to be functionally comparable, competitive offerings, based on analysis of the intended purposes and applications of commercial products.

(3) "Commercial product procurement action" means any procurement action which involves any acquisition of commercial products by or for the federal government.

(4) "General public market" means customers other than government customers or customers who are affiliated with the contractor or offeror.

CONSORTIUM of SOCIAL SCIENCE ASSOCIATIONS
1522 K STREET, NW, SUITE 836, WASHINGTON, D.C. 20005 • (202) 842-3525 • FAX (202) 842-2788

TESTIMONY SUBMITTED FOR THE RECORD

CONSORTIUM OF SOCIAL SCIENCE ASSOCIATIONS
(COSSA)

HOWARD J. SILVER Ph.D.
EXECUTIVE DIRECTOR

ON THE

REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

HONORABLE JOHN GLENN, CHAIRMAN

FEBRUARY 28, 1990

CONSORTIUM OF SOCIAL SCIENCE ASSOCIATIONS
1522 K STREET, NW, SUITE 836, WASHINGTON, D.C. 20005 • (202) 842-3525 • FAX (202) 842-2788

The Consortium of Social Science Associations (COSSA) represents 185,000 American Scientists across the wide spectrum of the social and behavioral science disciplines. It functions as a bridge between the research community and the Washington community. A list of COSSA Members, Affiliates and Contributors is attached to the testimony.

We would like to take this opportunity to comment on the reauthorization of the Paperwork Reduction Act (PRA). In addition, we would like to comment on some of the specific provisions of S. 1742. In general, we support the bill, and believe it should, with a few modifications, move forward.

COSSA became involved with PRA in 1985 upon receiving a number of phone calls from people in federal agencies complaining about the OMB paperwork clearance process and its impact on research conducted by federal agencies. In particular, there was concern that OMB was picking on social science techniques and methods in an attempt to discredit research conducted by those disciplines. This was not unheard of during the Reagan administration.

Following the receipt of this information COSSA conducted an investigation into some of the complaints. We discovered the abuses of the Paperwork Reduction Act of 1980 that have been noted throughout the testimony before this committee. We then provided what we had learned to various committees in the Congress. THe House Science and Technology Committee under its then chairman, Rep. Don Fuqua (D-FL), agreed to ask the General Accounting Office to conduct a study of OMB information clearance procedures. The report "Paperwork Reduction: Mixed Effects on Agency Decision Processes and Data Availability," was released on October 12. Confirming the findings of the COSSA investigation, the report noted that OMB policies and practices regarding approval of data collection efforts have had a "chilling effect" on the initiation of the collection of information. This effect caused agencies to hesitate before proposing surveys or other data collections because of anticipated OMB disapproval.

COSSA's main concerns have been with the information clearance process and its impact on the research agendas of the agencies. We are also concerned with the health of the nation's statistical system. Thus, we strongly endorse the need for an enhanced statistical office within OMB to better coordinate the data collection and dissemination activities of the United States government. The statistical effort has for too long taken a back seat to other functions within OIRA. It needs considerably more resources, both in money and people, to carry out its functions proscribed by the law. The idea of an Advisory Committee on Statistical Policy is a first step, but without the additional resources very few other steps can be taken.

COSSA supports the renaming of the Act to the Federal Information Resources Management Act to better reflect the purposes of federal policy regarding information collection and dissemination. The old PRA emphasis on minimizing burden and paperwork reduction needs to be balanced with a strong statement about the importance of information to the country and its citizens. We strongly support the inclusion of a statement on the **benefits** of information to balance the statements on minimizing the burden and costs of information. We believe that the latter are secondary concerns to ensuring the free flow of and access to information collected by its government for U.S. citizens.

COSSA still supports a broad definition of "practical utility" to include the public's needs as an important criteria for information collection decisions. Too often "practical utility to the agency" has been used as an excuse to deny survey requests and limit information collections.

COSSA favors the removal of the Section 3505 from the Act. Setting numerical goals for burden reduction has only led to massive fudging of numbers that have no meaning. The information collection budget is a useless quantitative concept that has not served any realistic purpose.

It is also important to suggest that information collection by the government has benefits, rather than just burdens, to the public. The Committee's efforts to make the Federal Register notices meaningful in Section 107 of the draft bill are also to be commended. These procedures should give the public the opportunity to understand what is being proposed and provides sufficient opportunity for a response. We also support the agency self-certification procedures in Section 107 of the proposed legislation.

COSSA would also like to see a major effort by OMB, in providing the funding, and the National Archives, in providing the expertise, to fully implement the Federal Information Locator System. A fully operational FILS will go further in eliminating duplication and waste than congressional mandates to reduce paperwork. At the very least there should be an indexing of all current information collection efforts, followed by a major effort to include previous collections. In this electronic information age it is imperative to take advantage of the opportunities to provide data in a fast, economical, and easily accessible manner.

On information dissemination we support all efforts to ensure access at minimal cost to data and information produced by the federal government. Government information is a public asset and should be readily available to the public on equal terms to all its citizens.

Regulatory review is a difficult topic for us to comment on. The university community has made it clear that in some very important instances OIRA has served a useful purpose in providing a centralized governmental perspective in certain areas of concern, e.g. regulations on animal research, scientific misconduct, and human subjects research. On the other hand, the evidence makes clear that OMB has abused its power to delay and frustrate the implementation of regulations in the areas of environmental protection and occupational safety and health. Given this dilemma, the most useful solution would be to make the regulatory review process as open to the public and interested groups as possible, without making it a logistic nightmare, e.g. keeping telephone logs of all conversations. The recent Supreme Court decision may help sort some of this out.

The role of OIRA during the past nine years of the life of the Paperwork Reduction Act has been a controversial one. The politicization of many OMB information collection decisions during the Reagan years created frustration and anger in the scholarly community. Although the new regime at OMB makes assurances that things have changed, it is important that protections against renewed abuses be enacted into law. It is also important that Congress indicate to the country that collecting information is not a burden on the public, but serves a beneficial purpose in making government more efficient in serving the citizens of the United States.

Thank you for the opportunity to present the views of the Consortium of Social Science Associations (COSSA).

NAM
National Association
of Manufacturers

JAMES P. CARTY
Vice President
Government Regulation, Competition
& Small Manufacturing

March 2, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
340 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed copies of NAM's Statement on amending the Paperwork Reduction Act. NAM welcomes the opportunity to file these comments and desires the statement to be made a part of the hearing record.

NAM and its members look forward to working with you and your staff on appropriate and strengthening amendments to the act.

Sincerely,

J Carty

enclosure

cc: Members of the Governmental Affairs Committee

1331 Pennsylvania Ave., NW
Suite 1500 - North Lobby
Washington, DC 20004-1703
(202)637-3047

STATEMENT
OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
TO THE
COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE
ON
REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT

MARCH 2, 1990

The National Association of Manufacturers (NAM) would like to take this opportunity to comment on the reauthorization of the Paperwork Reduction Act (PRA), and we thank you for holding open the hearing record of February 21 and 22.

The Supreme Court, in Dole v. United Steelworkers of America, which was handed down on the first day of hearings, has helped to focus the debate that has raged over the last year on reauthorizing the PRA. The Court's ruling that the congressional intent should be read so narrowly as to conclude that information collection requests and reporting and recordkeeping requirements kept by or provided to a party other than a federal agency are not covered by the PRA must come as a shock to the authors and supporters of the legislation, as well as to the general public. Senators and representatives did not, contrary to the Court's implicit interpretation, mean to "hoodwink" their constituents by speaking strongly against the paperwork burden imposed on the American public by federal agencies while simultaneously granting them authority to impose duplicative and unnecessary information collecting and/or dissemination requirements.

In effect, the Court has decreed that Congress intended to allow agencies to impose paperwork burdens as long as they minimize their own costs. In other words, agencies are free to engage in a paperwork and regulatory reign of terror as long as they require private sector parties to maintain required records or supply information to third parties.

NAM offered testimony before the Subcommittee on Government Information and Regulation, chaired by Senator Jeff Bingaman, on June 16, 1989. Our concerns at that time are still relevant, but for the records we would now like to highlight our four major recommendations, with a short clarification in light of the debate over the last year surrounding reauthorization.

(1) That the Office of Information and Regulatory Affairs be reauthorized for a period of five years. Unfortunately, no legislative vehicle has yet offered a five-year authorization.

Especially with the additional burdens and responsibilities imposed on OIRA by all formal proposals, it is inconceivable that the agency not be given a more reasonable authorization period. Some have argued that a short authorization is necessary to provide adequate "oversight" of OIRA. This assumes incorrectly, however, that Congress may only conduct oversight hearings during times of reauthorization.

(2) That the regulatory agencies review their paperwork requests to assure conformity with both the letter and intent of the PRA. While it is important for agencies to submit information collection requests to OMB within the confines of the requirements of the PRA, this is not an endorsement for the so-called "agency self-certification" process (see below). We have been encouraged, however, to note that both S. 1742 and H.R. 3695 provide for information officers who would be both independent of agency program officers and charged with reviewing information collection requests for their compliance with the PRA prior to a submission to OMB.

(3) That OMB regulations requiring the agency to print on the form an estimate of the burden hours to complete the form be made a statutory requirement. This regulation has been particularly helpful to small businesses and average citizens in determining the accuracy and truthfulness of agency burden estimates. While neither H.R. 3695 nor S. 1742 directly requires printing the estimate on the form, we are pleased to observe that

both bills recognize that the burden of paperwork is more than merely the time it takes to fill in blanks or to check boxes. Still, the inclusion of the estimate disclosure by statute would be helpful in assuring the accuracy of the agency's estimate.

(4) That Senate Rule XXVI, Paragraph 11(b), be enforced. This rule, which is routinely ignored, requires the evaluation of the direct regulatory impact of pending legislation, including paperwork required by the accompanying report, and the disclosure of such information in the report. The Senate should use this rule more effectively if it is truly serious about minimizing paperwork.

S. 1742, with its recognition that federal paperwork continues to burden the American public, offers a good starting point for further revisions. Especially in light of last week's Supreme Court decision, there are several items that should be clarified by this Committee.

First, the purposes and definitions section needs to ensure that Congress intends for the federal paperwork burden to be deemed any paperwork imposed by an agency, whether directly for that agency or not. To further this point, the PRA reauthorization should explicitly include--rather than exclude--information collections contained in a rule. There is no logical reason to separate the two, unless members of Congress wish to tell their constituents that agencies are free to impose as much paperwork as they wish so long as it accompanies a regulation or rule. Paperwork is paperwork, even when it emanates from an onerous regulation by an overzealous agency.

Second, the Director of the Office of Management and Budget should remain statutorily responsible for the review of paperwork. Even if he or she has regularly delegated this responsibility, the fact is that the Director as a Cabinet-level official and the primary person in the executive branch charged with management and oversight responsibilities should be, by statute, the ultimate authority. To lower the level of review would be to signal that paperwork reduction is not a primary function of OMB. One purpose of the kind of paperwork review that has been taken from OMB is the role of scaling back one agency's rule that might duplicate that of another agency. A Cabinet-level official is the appropriate level to resolve such inter-agency conflicts.

Third, the confidentiality of information submitted to the government must be protected better under the bill. Since S. 1742 places such a great emphasis on dissemination, there may be a potential, albeit unintentional, conflict with the "trade secrets" protections of Section 4(b) under the Freedom of Information Act due to agency mishandling of information. The primacy of Section 4(b) in these circumstances should be reinforced.

Fourth, any new statute should recognize the importance of balance between the cost of new regulations and information collection requests against their supposed benefits. The private sector routinely engages in such analyses and the public sector could certainly benefit from them as well.

Fifth, the "self-certification" provision of S. 1742 needs revision. There is little reason to believe that an agency will give up an information collection voluntarily. As stated earlier, NAM supports the concept of agencies accepting greater responsibility for complying with the Paperwork Reduction Act, but a central arbiter such as OIRA should retain the ability to review renewals of information collections on the basis of necessity, burden and duplicativeness.

The Court has provided Congress with a unique and timely opportunity to strongly reaffirm its original intent in enacting the PRA, this time in no uncertain terms. The reauthorization must make clear that the PRA is principally to protect the American public from overly burdensome, unnecessary, and duplicative paperwork, not to ease the workload on federal civil servants. The draft legislation submitted by the Association of Records Managers and Administrators goes a long way toward meeting this goal, and we urge the Committee to review their proposal closely.

While the tone of this statement is strong in its denunciation of needless and burdensome paperwork, it should be noted that NAM is not oblivious to the benefits of information collection by government agencies. Census data and the Consumer Price Index, for example, are used extensively by many of our member companies for marketing purposes. We believe, however, that information that is directly useful and necessary for the proper functioning of an agency's mission must be collected, analyzed, and used in an efficient and effective manner.

In closing, NAM would like to express its appreciation to Senator Bingaman and the staff of the Government Information and Regulation Subcommittee for their wide outreach efforts while drafting S. 1742. If we could be of any more assistance, or if the Committee has any questions, please do not hesitate to contact us.

Statement of
Dr. Leon W. Transeau
Executive Chairperson
Association for Federal Information Resources Management
(AFFIRM)

regarding
S.1742 - The Federal Information Resources Management Act

to the
Committee on Governmental Affairs
United States Senate

February 22, 1990

AFFIRM

Association
For
Federal
Information
Resources
Management

Statement of
Dr. Leon W. Transeau
Executive Chairperson
Association for Federal Information Resources Management

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Dr. Leon W. Transeau, Executive Chairperson of the Association for Federal Information Resources Management (AFFIRM), a non-profit professional organization founded in 1979 to promote and advance the practice of information resources management (IRM) in the United States Government. We are a small but active organization of several hundred members drawn from both the Federal government and the private sector. AFFIRM members hold a number of key IRM leadership positions. Our activities include the sponsorship of professional meetings and seminars and merit awards to university students engaged in IRM studies. We provide a forum for IRM professionals to exchange and express opinions freely without agency or company endorsement. Our paramount goal is to improve the management of information systems and resources within the Federal government.

My views are based upon 18 years of Federal IRM-related experience and 13 years of private sector experience, the latter primarily as a consultant developing and evaluating management information systems. Overlapping this is 22 years of experience teaching management at the graduate level.

I would first like to address myself to the overall aspects of the Paperwork Reduction Act (PRA). I believe that this Act has contributed significantly to accomplishing its purposes as set forth in 1980 and I certainly support its reauthorization and that of the Office of Information and Regulatory Affairs (OIRA), which administers the Act. At issue, as I see it, is how the PRA can be strengthened to better achieve the purposes set forth in Section 3501 of the 1980 Act. The answer, quite frankly, is not contained within S.1742 as drafted. In fact, it would be much wiser to leave the PRA unrevised rather than to adopt the amendments of S.1742.

Some of the most significant problems with S.1742 center on the issue of agency self-certification. The concept of self-certification by agencies that have "complied" with the PRA is part of the fundamental structure of S.1742 (p. 27, et seq.). Some of the problems raised are as follows:

* Section 107 (3), which would amend 44 USC 3507 by revising Subsection (d)(p. 30), changes current law so as to make the maximum approval period of three years apply only to information collections not "required by a rule." However, most information collections are a result of, or derived from some rule or regulation. This revision would appear to remove the 3-year approval cycle in most cases.

- Section 107 (4), which would amend 44 USC 3507 by adding a new subsection (j)(4)(pp. 33-36), limits OMB's power to override "self-certifications" to situations where the agency was "arbitrary and capricious," a standard almost impossible to meet.

- The self-certification process of Section 107 assumes that agency officials are able to identify and revoke unreasonable information collection requirements. However, experience has shown that internal agency pressure makes it difficult for anyone within an agency to prevent paperwork proliferation. Only an outside authority can serve adequately to control duplication and unnecessary information collection. This has been recognized since 1942.

An important aspect of the PRA was "to minimize the Federal paperwork burden for individuals, small businesses, state and local governments, and other persons." While S.1742, Section 105, sets goals to reduce paperwork burden, it does not address the basic issue of how reductions in paperwork burden are measured.

Under existing OMB procedures, paperwork reductions are measured from what has been referred to as a "floating" base. Under the floating base concept, an agency can claim to Congress that it reduced the paperwork burden imposed upon the public during a year when the agency's paperwork burden actually increased. In the place of this floating base system, we need a fixed-base accounting system that facilitates year-to-year comparisons of the total paperwork burden and that provides a true measure of changes in the total burden imposed upon the public.

We also need uniform procedures for estimating the burden imposed upon the public. At ~~present~~ there are none. As determined appropriate by OIRA, these procedures should include active solicitation of input from a representative cross-section of the affected respondent population. The burden estimates obtained from respondents should be the basis for agency estimates unless an agency can fully justify to the Office of Management and Budget (OMB) a more appropriate estimate. The recent move by OMB changing burden estimates from 1.88 billion hours to 6.2 billion hours points out the problems of relying upon agency estimates.

I recommend that we use estimates made by people who fill out the government's forms because my experience has shown that the public is far more realistic than Federal agencies in making estimates of this public burden. Most people familiar with the situation believe that Federal agencies have understated, on the average by a factor of 7 to 10, the time required to fill out the government's forms. Only the IRS has reevaluated its estimating process. Upon doing so, they revised their estimates upward by a factor of 7, which is why OMB now acknowledges 6.2 billion hours of burden.

I have focused attention on the need to improve the estimation and reporting of the paperwork burden for a very simple reason. I am convinced that Congress and the American people will be shocked when they learn in graphic terms the true enormity of this burden upon our citizens, our businesses and other institutions. For example, the cost for businesses to fill out Federal forms probably far exceeds the Federal income taxes paid by businesses. When such numbers are accurately estimated and widely publicized, there will be loud demand for greater action.

I also believe in encouraging public participation in reviewing the paperwork burdens imposed by the Federal government. Several years ago, I proposed that all Federal public-use forms display an estimate of the time to fill out the forms and to invite comments on the forms. This suggestion, which was adopted through a revision of OMB's regulations governing paperwork, is but a first step in the possible ways that we can involve the public in addressing this problem.

I believe that we now should take the next step by establishing private sector task forces to review selected Federal forms that have proven to be most troublesome and burdensome. The individuals appointed to these task forces should be free of agency influence and have no vested interest in the continued proliferations and complexity of the paperwork. The task forces should be truly independent of the agencies imposing the paperwork at issue and should have strong representation from providers of the government's information. Agencies should be required to either adopt the recommendations of the task forces or justify to OMB their reasons for not doing so.

Advisory groups and so-called "focus groups" that are established by some Federal agencies to address specific paperwork issues may be useful, but such groups are poor substitutes for truly independent studies of the kind that I am suggesting. In fact, agencies can use advisory groups under their control to narrow criticism by limiting the issues addressed and by interpreting findings to agency advantage.

One of the PRA's major problems, which remains uncorrected under S.1742, has been the lack of substantive incentives for agency and individual support of the Act, particularly in the area of meeting reduction goals established under the Act. Good performance yields the same results as poor performance. Essentially nothing happens.

To my knowledge, only one agency, the Department of the Interior, even has an award specifically established to recognize employees for reducing reporting and recordkeeping burdens imposed upon the public. I think every Federal agency that places substantial burdens upon the public should have an incentive program to recognize significant employee contributions to this program.

In the final days of the 100th Congress, Rep. Tom DeLay proposed the establishment of a Congressional award for Federal paperwork reduction (H.R. 5554). I understand that this bill may be reintroduced. If so, I believe that it deserves thoughtful consideration. The award would recognize highly significant contributions in the following areas: (1) Simplification of forms so they are more understandable, particularly to socially disadvantaged individuals and socially and economically disadvantaged small businesses, (2) use of automated technology in collecting information, (3) development of proposals to simplify laws and regulations and thereby eliminate paperwork, (4) promotion of cooperation among Federal agencies in the elimination of duplicative collections and in the sharing of information, and (5) paperwork reduction for small businesses and industries adversely affected by foreign competition. Beyond the recognition of deserving recipients, this award would demonstrate Congress' commitment to minimizing the enormous federal paperwork burdens imposed upon our country.

We also need to establish increased accountability in meeting statutory paperwork reduction goals. For every information collection that an agency targets to meet these goals, the agency should designate a program official to be responsible for achieving the reduction. The performance standards for each such responsible official should include a critical element for the attainment of the explicit burden-hour reduction goal assigned by the agency.

The foregoing are but a few of the possible incentives that can be introduced to support the PRA. Unless some meaningful incentives are devised, there likely will be limited interest in this program within the bureaucracy.

Something also needs to be said about the resources available to OIRA to fulfill its responsibilities under the PRA. S. 1742 places vastly expanded responsibilities upon OIRA without providing the requisite funding. This can only mean that less effort and time can be expended on paperwork reduction.
One needs merely to do some "back-of-the-envelope" calculations to determine that OIRA has precious little time on the average to review the thousands of regulatory actions and information collection requests that come before it each year for review. Even the official numbers are misleading because a single clearance request from an agency may include scores of agency forms. It is difficult to hold OIRA accountable for doing a job well when clearly it is short of the resources needed to perform the task.

Morale of OMB personnel is another important consideration. The desk officer position is the heart of OIRA. This is clearly a high pressure position where experience is important. Providing a higher grade structure and correcting the present understaffing as recommend by GAO will do much to retain the talent needed in that organization.

We must consider those who are severely burdened by overly complex Federal forms and who are often in the weakest position to challenge these burdens - our elderly, who have to wade through pages of information requests to obtain an entitlement that can make the difference between receiving medical care or not; our poor and disadvantaged, who are often not able to decipher the needlessly cumbersome bureaucratese contained in many of these forms and must rely on social service agencies or churches to assist them; and small business operators, trying to be competitive, yet finding themselves with numerous and often repetitive information requests, with scarce resources to comply. These individuals are the true constituency of the PRA. They will benefit most by efforts to improve Federal information resources management and reduce to Federal paperwork burdens.

Reducing the federal paperwork burden imposed upon businesses.

Try this test:

What cost businesses more in 1988?
(a) Federal income taxes.
(b) Filling out federal forms.

[Answer: b and by a good margin.]

THE ENORMOUS HIDDEN BUSINESS TAX[1]

by

Leon W. Transeau, Ph.D.

A Hidden Tax

Surprising as it may seem, there is substantial evidence that the work associated with filling out federal forms is costing businesses in the United States far more than they pay in federal income taxes. Businesses have very little choice in whether to fill out these forms. Only 6 percent of all federal forms are prepared on an optional basis, leaving 94 percent that are mandatory or necessary to obtain a "benefit". Thus, the cost of filling out federal forms is actually an enormous hidden tax imposed upon businesses.

This hidden tax has significantly reduced profits and, thus, the competitive ability of the nation's businesses. It has contributed to a myriad of economic woes, including our worsened position in world markets where in 1988 alone we suffered a $137 billion trade deficit.

The paperwork tax often takes a circuitous route on its way to the taxpayer and consumer. In a strange twist, some of this tax is first returned to the government in the form of higher prices for goods and services that it purchases. Such is the case for defense-related procurement paperwork, which accounts for over 14 percent of the federal paperwork burden.

Horror stories abound when business people recount experiences with federal procurement paperwork. E. J. Dale, Vice President for Advanced Programs at Electronic Data Systems Corporation, offered one such story at an industry meeting in Washington, D.C. last year. Dale cited a procurement for which his company submitted a proposal that with copies weighed almost 2,000 pounds. The winning proposal from another bidder was over five and one half feet high and with copies weighed over 4,200 pounds.

Many people had high hopes that the Paperwork Reduction Act of 1980 would end such horror stories, but that has not been the case. While the government's official figures show a decrease in paperwork burdens for the first six years under the Act, they also show an eight percent jump in paperwork during the seventh year. Many questions about the success of the Act are sure to be raised when Congress considers its reauthorization.

Because the work associated with federal paperwork is considered by businesses to be an unavoidable cost, management devotes little, if any, attention to this matter. Thus, while proposals for new traditional taxes on businesses are assured of generating a firestorm of protest by the business community, the hidden taxes associated with equally costly new paperwork requirements are likely to pass with only a whimper of opposition.

In part, opposition is limited by the fact that the business community is highly segmented in terms of the paperwork burdens imposed upon it. Each segment reacts to its unique paperwork burdens with limited knowledge of the requirements imposed upon other segments. Collectively, however, these requirements have reached such proportions that federal paperwork saddles American industry with an enormous burden. In fact, today about two-thirds of all of the federal government's paperwork burden is imposed directly upon businesses.

Keep in mind that the federal paperwork burden is only a part of the total paperwork burden being imposed upon businesses. State and local government paperwork burdens overlay the federal requirements, often with little or no coordination. To these government-imposed paperwork requirements, we can add the papermill created by desk top computers with high speed printers, facsimile machines, and other innovations of technology. Does all of this suggest that we are really headed toward the "paperless" office? Barbara Hemphill in her book, *Taming the Paper Tiger*, suggests instead that the country is headed toward a paper crisis gridlock!

The paperwork problem is particularly onerous for small businesses because they lack the specialized staffs familiar with complex government requirements and must devote key management personnel to an inordinate amount of this work. In some industries requiring federal licenses, small businesses find that the thousands of hours of paperwork necessary to obtain a federal license can impose an insurmountable barrier to entering the industry.

Historically, the hidden taxes associated with federal paperwork have been difficult to estimate. Through improved estimates made during the past year, however, we now are learning that the burden of paperwork on the nation's businesses is far greater than previously reported. At issue is whether this new information will provoke the business community and the government into placing greater emphasis on the problem.

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[1] Reprinted from *Affirmation*, December 1989

A New Notice on Forms

In an effort to address some of the problems associated with federal paperwork, the government now is requiring all agencies to print a new notice on its public-use forms. This notice encourages public comment on federal paperwork requirements by providing respondents the following information on each form:

- An estimate of the average time required to complete the form, including time for reading instructions, gathering data needed, and completing and reviewing the materials provided.
- Addresses at the Office of Management and Budget (OMB) and at the agency where the form originated so that anyone can write to comment on the agency-estimated completion time or suggest improvements to the form.

How Can the New Notice Help?

Few people realize that OMB, a part of the Executive Office of the President, for years has reviewed and approved all federal forms prior to their use. As a part of justifying the use of a form, an agency must estimate the average hours of work needed for a person to complete the form. Various business groups have long complained that federal agencies admit to only about one-seventh to one-tenth of the actual time required to complete federal forms. Probably the most persistent critic making this claim is the Business Council on the Reduction of Paperwork, a Washington-based group. The Business Council and other critics say that underestimates have allowed federal agencies to downplay paperwork burdens and thereby attract less attention in gaining OMB's approval for new paperwork. Business critics believe that feedback from the public on the accuracy of agency estimates will help to eliminate this problem.

Specifically, business critics hope that fictitiously low paperwork burden estimates placed on forms by agencies will generate strong negative reaction from the public and force the offending agencies to correct their estimates. Critics believe the results could be dramatic. They point out that in August 1988, soon after the new notice on forms became a government-wide requirement, the IRS released a study stating that it actually takes seven times as long to complete federal tax forms as they had previously estimated! Critical public feedback might have resulted in closer review of an International Trade Commission form that some business executives said was taking an average of 2,000 hours to complete, yet was estimated by the Commission to take only 20 hours. In 1987 this won the Commission the unwanted "Annual Crock of Red Tape Award" from the Business Council and front page notoriety in the press.

What about public feedback offered directly to an agency; is it likely to be helpful? One can expect such feedback to be "bucked down" for evaluation to the agency official most familiar with the form. However, that official is also likely to have a subordinate staff processing the completed forms or be dependent upon the form in some other way to bolster, if not preserve, their job. If complaints or suggestions threaten this vital interest, then it should not be surprising for the official to prepare a defensive, unsympathetic response.

Official Washington has learned in such cases that a position can be defended well by raising fears regarding national security, safety, health, or the collection of revenues. Taking a counter position can at times make one appear even unpatriotic. The eighteenth century scholar, Samuel Johnson, probably was reacting in part to the defenses of bureaucrats when he stated, "Patriotism is the last refuge of a scoundrel."

Certainly, OMB analysts can be more objective than analysts within the agencies that are proposing paperwork. OMB analysts have no great vested interests at risk, and arguably are more committed to eliminating unnecessary paperwork than managers whose jobs are directly in jeopardy.

Of course, no agency wants thousands of complaints about its paperwork sent to OMB, a powerful and highly visible office that reports directly to the President and is perched next to the White House. OMB has some of the best analysts in Washington, but it has fewer than 60 such staff members to review the thousands of forms and regulations submitted to them each year. Complaints and suggestions obviously could help OMB to focus its very limited resources on the forms reported by business respondents to be unduly burdensome, or displaying grossly understated completion times.

Accurate time estimates are very important because the estimates are used in calculating the total hours of burden imposed by federal paperwork. They are also used in formulating information collection budgets. These budgets are developed annually for each agency, and whenever possible, are directed at reducing the total hours of work required by the public to do an agency's paperwork. In the absence of accurate time estimates, the budget process can degenerate into a numbers game between the agencies and OMB.

The Total Burden

When the IRS released the study showing a seven-fold increase in the estimated time to fill out its tax forms, the government's overall estimate was immediately shown to be very much in error. OMB, relying for years upon simply adding together individual agency estimates, had been reporting that less than 2 billion hours of paperwork were required from the public to satisfy the government's total information needs. The re-estimate, developed for the IRS in an Arthur D. Little, Inc. study, revealed that the IRS portion alone of the federal paperwork burden was 5.4 billion hours for 1985. That was approximately three times as much as the burden previously reported for the entire federal government. So much for the accuracy of the reports that were sent to the President and the Congress all of those years! However, one can only applaud the IRS for showing the political courage of making such an enormous adjustment in its estimates and, thereby, trying to set the record straight. Hopefully the IRS has provided a lead that other agencies will follow.

The significance of the IRS revision is staggering. It means that if tax work could be evenly distributed throughout the year, it would take 2.7 million people working full time just to prepare federal tax returns. That is one-half million more people than in the entire active armed forces of the United States! Now, even this estimate may be low because the Tax Reform Act of 1986 has further increased the reporting burden.

The IRS is responsible for the single largest share of the federal paperwork burden. In fact, the Department of the Treasury collects 46 percent of the information that the public must supply to the federal government, mostly for the IRS. Thus, the IRS adjustment helped to correct the burden estimate for a large portion of the government's paperwork.

What about the remaining portion of the government's paperwork burden?

That also has been grossly underestimated and should be multiplied by a factor of at least seven according to business critics. If this recommended correction were made to the government's official paperwork burden estimate for 1988, the adjusted figure would rise from 1.8 billion hours to 12.6 billion hours. The government estimates that 64 percent of its paperwork burden falls upon businesses, so the adjusted estimate of the burden upon businesses for 1988 would be approximately 8 billion hours. Assume the critics are correct in their adjusted estimate of the total federal paperwork burden imposed upon businesses, just as they were proven correct in the adjusted estimate for the IRS. What then is the real federal paperwork cost to businesses? To estimate this cost, we first must calculate an appropriate hourly rate for businesses to process paperwork. According to the Bureau of Labor Statistics, private industry workers in 1988 received an average compensation with benefits of $13.79 per hour. To this rate must be added an amount for administrative and overhead costs. In the absence of good national statistics for these costs, we will multiply by 1.5, a rule-of-thumb factor for such estimates, giving an adjusted cost of $20.69 per hour.

Using the preceding estimate of 8 billion hours of paperwork at $20.69 per hour, the cost for businesses to process federal paperwork in 1988 is calculated to be $166 billion. This is almost ***46 percent greater*** than the estimated $114 billion in federal income taxes paid that year by corporations, partnerships, and proprietorships!

It can be argued that these estimates grossly understate the true cost of federal paperwork to businesses for at least two important reasons. First, it can be argued that, contrary to government estimates used in the calculations, *more* than 64 percent of all federal paperwork is handled by businesses. A higher percentage can be claimed because a number of so-called "individual" forms, none of which are counted in the 64 percent, are filled out on company time and, therefore, should be counted as business forms for purposes of this analysis. For example, the IRS W-4, an individual form which is used to calculate the withholding of taxes on wages, is usually filled out by employees at their places of work and, thus, is a cost to businesses, not individuals.

Second, it can be argued that calculations using the average hourly rate for all industry workers produce low estimates because much federal paperwork can be handled only by highly paid managers and professional personnel, such as accountants and lawyers.

Change Will Not Come Easily

The purpose of appending the new notice to all federal public-use forms seemed about as American as one could get - to promote greater public participation in helping to control the government's massive paperwork burden. However noble its purpose, even this seemingly trivial initiative may be seen as a threat to the vital interests of many bureaucrats. This is because a great many federal jobs consist wholly of processing and analyzing forms filled out by the public. Even forms that require a minimum effort for individual businesses to complete, when multiplied by the hundreds of thousands or millions of copies completed across the country, may fully justify scores of bureaucrats in Washington. Thus, some jobs might be at risk for suggestions that make even minor improvements in a form.

When the author was Chief of Management Analysis for the Drug Enforcement Administration, his staff tried over a period of years to convince several managers to adopt a paperwork reduction proposal that potentially affected their positions. The proposal was to issue three-year licenses, rather than one-year licenses, to the 600,000 physicians, dentists, and other registrants handling controlled drugs. However, three-year licenses require only about one third the number of bureaucrats to process the applications. After a number of studies and long delays, the change finally was made to a three-year licensing period with significant savings for both the registrants and the agency.

Even when senior officials within an agency make a concerted effort to attack burdensome paperwork, lower-level bureaucrats often have the upper hand in preserving the status quo. According to a 1989 report by the National Commission on the Public Service, the average tenure of Senate-confirmed political appointees declined with each administration since President Johnson and was down to only two years in the Reagan Administration. From 1979 to 1986, political appointee members of the Senior Executive Service remained in their positions for an average of only 20 months and 40 percent of all political executives remained in their positions for less than one year. Considering their short tenure and the fact that they may be months on the job before addressing paperwork issues, these high-level executives are likely to have little time in their positions to move an entrenched bureaucracy toward reducing paperwork.

It is more likely that these executives will be consumed with agency matters that are much more immediate and pressing than paperwork burdens imposed upon the public. After all, haven't businesses found ways to adjust to the government's paperwork burdens? Well, at least the survivors have!

Except for the Small Business Administration, most federal agencies were unsupportive of the idea of placing the new notice on federal forms. While thoughtful points were raised in opposition, a number of comments are to be remembered for their unintentional humor, rather than their substance. For example, one agency official said that placing the notice on forms would take up blank space where the public could write notes of various kinds. In other words, someone in Washington thinks that businesses want note and doodle space on federal forms more than they want to see the paperwork process improved.

Objections to the new notice finally subsided after this seemingly trivial issue percolated all the way up to the White House where the President himself put the matter to rest. In an administrative message to Congress in January 1988, President Reagan advised that such a paperwork reduction regulation would be issued. The regulation was issued in May 1988 and the new notice now is appearing on forms as they are being reauthorized and reprinted.

The public's opinion on having the new notice appended to federal forms contrasts sharply with the view held by officials in most federal agencies. Business executives from organizations large and small, and individual citizens overwhelmingly applaud the new invitation to comment on federal paperwork. Both Republican and Democratic lawmakers who have spoken on the subject also have been highly supportive.

Less certain, however, is whether lower-level managers in businesses share the same enthusiasm for such paper-cutting initiatives as do senior executives. A senior corporate executive commented to the author that some of his lower-level managers had absolutely no incentive to complain about unreasonable federal paperwork. He noted that it was the complexity and volume of federal paperwork that justified the level of their salaries and size of their specialized staffs!

Unfortunately, some people believe that any proposal to reduce paperwork burdens imposed upon businesses is a ploy to defeat laws or regulations protecting some public interest. Right or wrong, they always see a hidden agenda. Such people would much rather accept the inefficiency of federal paperwork than attempt to simplify it and in the process open Pandora's box to changes that might threaten their vested interests. These attitudes will not be changed easily and they will serve to confound any progress in eliminating useless reporting requirements.

Protection of the public good is not ensured by a tangle of hoops through which businesses must jump. In fact, mounds of paper dumped on Washington can produce the very opposite effect by burying important information in piles of useless data.

It can be argued, however, that mounds of paper do help to preserve the status quo. In his book, *Management and the Activity Trap*, George Odiorne stated, "Confronted with data over which it is difficult to extract significance, management has a natural tendency to move slowly, maintain the status quo, or perhaps retreat to a previously prepared position." Simply stated, management buried in paperwork loses its initiative for change. As C. Northcote Parkinson observed, "The man whose life is devoted to paperwork has lost the initiative for change. He is dealing with things that are brought to his notice, having ceased to notice anything for himself."

Within the federal government, agency officials all too often are prepared to point to Congress as the principal perpetrator of unnecessary paperwork and the major obstacle to eliminating it. While Congress can share in the blame, such sweeping charges are simply not justified.Congress must rely heavily upon the agencies to advise it of the burdensome aspects of proposed legislation and that advice is not always correct. Moreover, federal agencies can always go back to Congress and ask for changes in legislation to reduce paperwork and related regulatory burdens, but they are often slow in taking such action. On the contrary, bureaucrats more than once have interpreted the broad language of legislation to justify the collection of large amounts of data, some of which Congress probably never had in mind, all the while blaming the burden on Congress.

Steps to be Taken

Some members of Congress are working actively on the federal paperwork problem. Sen. John Glenn (D-OH), Chairman of the Senate Governmental Affairs Committee, has a newly-established Subcommittee on Information and Regulation led by Senator Jeff Bingaman (D-NM). This new subcommittee will undoubtedly focus attention on the paperwork issue. In the House of Representatives, a number of Congressmen, including Rep. Tom DeLay (R-TX) and Rep. Ron Marlenee (R-MT), are working to sponsor legislation designed to promote federal paperwork reduction.

Possibly the newly-established Council on Competitiveness to be chaired by Vice President Quayle also will find this paperwork issue a very appropriate topic for consideration.

Unfortunately, the President and the Congress for years have not received an accurate assessment of the enormity of the federal paperwork burden imposed upon the nation. Had they been given better information on which to act, we might be much closer today to solving this problem.

What we need now are some new approaches that will take us beyond whatever successes we have had to date in reducing federal paperwork burdens. There are many opportunities. Here are just a few of the possible initiatives and some thoughts on each.

Mobilize the business community to challenge the enormous hidden taxes imposed upon them by federal paperwork.

If any substantial progress is going to be made toward reducing paperwork burdens imposed upon businesses, then the business community must show genuine interest in this issue and become much more involved. At present, business efforts toward this end are generally underfunded, uncoordinated, and reactive. A common scene around Washington is a few business representatives dashing frantically about in an eleventh-hour effort to round up support against some seemingly ill-conceived, paper-producing initiative, in which they should have been fully involved from the outset, but for whatever reasons, were not. There are exceptions to this, of course, but the general pattern is all too familiar.

The business community has a very strong case to present if it only would get its act together and accomplish the task. Once businesses shift into a proactive mode, there are numerous initiatives they could pursue, including some novel ideas that would make the government think very seriously about the cost of paperwork. An example might be for businesses to seek tax credits for filling out some of the government's more burdensome forms.

The business community's return on investment in helping to solve the paperwork problem probably would be greater than almost any alternative investment opportunity. Absent this investment, the problem is likely to persist and could even get worse.

Whenever possible, businesses should work closely with industry groups that are active in paperwork and regulatory matters, particularly when they have a concern that acting alone could result in making them a target for some form of retaliation. Industry groups can provide anonymity and generally speak with a stronger voice. Unfortunately, however, many of these groups have shown only occasional interest in federal paperwork issues. While a number of organizations give lip service to the subject, few can show that they have applied much elbow grease in terms of researching the issues, discussing the problems in detail with federal officials, developing workable alternative solutions, rallying support from corporate America, or taking the other steps that make for success in such matters. Certainly, the business community needs better representation of its interests in these matters.

Hopefully, OMB's new invitation for comments printed on each federal form will promote spontaneous feedback and cooperation among businesses to challenge grossly inaccurate time estimates whenever they appear on the forms. Such feedback and cooperation can provide an efficient check and balance against government errors and mischief. It can also produce an abundance of ideas for simplifying paperwork. For as Bernard Baruch once observed, "The highest and best form of efficiency is the spontaneous cooperation of a free people."

Establish private sector task forces to study selected federal forms.

Much more can be done to involve the public in the process of reducing federal paperwork. Inviting public comment through the new notice appearing on forms should be seen as only a small first step toward this end. Nonetheless, one business group predicted that this step alone would stimulate several billion dollars worth of paperwork reductions annually.

Clearly, vested interests within the federal establishment are too great to hope that the federal paperwork problem can ever be solved without substantial public attention and participation.

Public participation could include the establishment of paperwork-reduction task forces organized in a manner similar to the President's Private Sector Survey on Cost Control, better known as the Grace Commission. Over 2,000 people from 850 organizations contributed to that effort in 1982-84. They were organized into 36 task forces with each task force focusing on specific issues.

Much care would be necessary in the employment of such task forces. The individuals appointed should be free of agency influence and have no vested interest in the continued proliferation and complexity of paperwork. Agencies should be required to either adopt the recommendations of the task forces or fully justify their reasons for not doing so to the Executive Office of the President. Implementation of the recommendations should be tracked by the Executive Office of the President and reviewed by the Congress.

Advisory groups that are established by some federal agencies to address specific paperwork issues may be useful, but such groups should not be considered alternatives to independent studies and reviews. In fact, agencies can use such groups to narrow criticism by limiting the scope of the issues addressed and by interpreting findings to agency advantage.

Establish incentives to achieve new federal paperwork reduction goals.

In both the original Paperwork Reduction Act of 1980 and the reauthorization of the Act in 1986, Congress set goals for reducing paperwork burdens, but there were no rewards or penalties established in conjunction with those goals. Some rewards and penalties are needed in the future, however, if tough reduction goals are to be established and met.

One way to ensure that senior agency officials place a high priority on meeting Congressionally established paperwork reduction goals would be to tie some part of each agency's fiscal budget to success in meeting those goals. Without question, that would get everyone's attention.

Also, agency program managers should be held individually accountable for achieving their portion of an agency's overall assigned goal. This could be accomplished by writing each program manager's performance standards to reflect their specific paperwork reduction assignments.

Awards would also be useful. At present, only one federal agency has an employee award specifically for reducing federal paperwork burdens imposed upon the public. However, Congressman Tom DeLay now is sponsoring a bill to establish such an award to be given to federal employees by Congress.

Provide educational opportunities and promote research on paperwork reduction issues.

There is presently no systematic formal training within the government for agency personnel who have responsibility at any level to review and approve the collection of information from the public. Clearly, this needs to be changed. Some formal training must be made available to these individuals so that they can "hit the ground running" and deal with the subject in a competent manner.

It also would be useful if a major university periodically sponsored a symposium on federal paperwork problems in order to promote study of the subject, and discussion of the issues among business executives, government officials, and researchers.

Concluding Remarks

Hopefully, this article has presented a clearer picture of the enormity of the federal paperwork burden imposed upon American businesses and an understanding that only through greater involvement of the business community can much progress be achieved in eliminating the collection of unneeded information.

The initiatives proposed are not offered as the final prescription or the only workable approaches for solving the problem. A strategy that combines a number of initiatives probably will prove to be the most effective approach.

The business community should be challenged by the cost-savings opportunity that this problem presents. Business executives should demand action to solve the paperwork problem and assume their rightful position in working toward that solution.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

February 20, 1990

Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request, the Department of Justice has reviewed S. 1742, the "Federal Information Resources Management Act of 1989." S. 1742 relates principally to regulatory review functions performed by OIRA pursuant to the Paperwork Reduction Act. Under that statute, OIRA reviews agency proposals to collect information from the public. A federal agency may not "conduct or sponsor the collection of information" unless the information collection request has been reviewed by OIRA and bears a control number assigned by OMB. 44 U.S.C. § 3507(a),(f). S. 1742 contemplates extensive changes in chapter 35 of Title 44, United States Code, and various other statutes concerned with the collection, management and dissemination of information by the Executive branch.

Certain provisions of S. 1742 address OIRA's review functions under Executive Orders 12291 and 12498. Under these executive orders, OIRA reviews agency regulatory proposals to ensure, to the extent permitted by law, that the agency has adhered to the President's regulatory principles. S. 1742 contemplates significant alterations in the procedures currently employed by OIRA to conduct such reviews.

Many of the changes proposed by S. 1742 would be objectionable as a matter of policy, and in addition would raise very serious concerns under the separation of powers mandated by the Constitution. Because we believe that the review procedures that S. 1742 would impose would intrude on the President's constitutional prerogatives, the Justice Department would recommend that it be disapproved if it were presented to the President in its present form.

I. Invasion of the Deliberative Process

The decision-making process within the Executive branch depends upon the willingness of the President's subordinates to express tentative, controversial, and sometimes unpopular policy views. The willingness of the President's subordinates to engage in this necessary exchange of ideas, however, will be in direct proportion to the degree of confidentiality their communications enjoy. Thus, it has long been recognized that Executive branch deliberations are privileged, both at common law and under the Constitution. The Paperwork Reduction Act and existing OIRA procedures already impinge upon the integrity of the decision-making process by publicizing certain Executive branch deliberations. S. 1742 would increase and compound the adverse impact on the deliberative process by mandating public access to a wider category of Executive branch deliberative materials, thereby requiring Executive branch deliberations over regulations to take place in a fishbowl. In particular, S. 1742 would strike at the very heart of the President's constitutional authority over agency rulemaking by opening to public scrutiny deliberative materials generated as a result of the regulatory review process under Executive Orders 12291 and 12498.

Article II of the Constitution vests all "executive Power" in the President of the United States. U.S. Const., Art. II, § 1. The President has the obligation, and the corresponding authority, to "take Care that the Laws be faithfully executed." Id. § 3. Consequently, the President has the constitutional authority to "supervise and guide" Executive branch officials in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. 52, 135 (1926). The President has chosen to exercise his supervisory control over the Executive branch regulatory process through delegation of his constitutional power to OMB pursuant to Executive Orders 12291 and 12498.

The Constitution gives the President power to protect the confidentiality of deliberations within the Executive branch. See Nixon v. Administrator of General Services, 433 U.S. 425, 446-55 (1977); United States v. Nixon, 418 U.S. 683, 708 (1974); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc). The deliberative process privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. at 708. It protects "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." Id. The Supreme Court has recognized:

> the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

Id. at 705.

The types of materials that constitute deliberative process communications are well established. They are the confidential internal advice, analysis, and recommendations used by the agency in determining its course based on the facts of record. They include analyses of these facts, legal and policy arguments, and factual data that cannot be reasonably segregated from deliberative material. They do not include oral or written factual data which can be reasonably segregated from deliberative material.

In a recent opinion applying the common law deliberative process exemption incorporated into the Freedom of Information Act, 5 U.S.C. § 552(b)(5), the en banc District of Columbia Circuit Court of Appeals denied plaintiffs access to a "Regulations Log" maintained by the Department of Health and Human Services, which listed "by title regulatory action proposed by FDA, the date on which the proposal was received by HHS, and, if applicable, the date on which HHS sent it on to OMB." Wolfe v. Department of Health and Human Services, 839 F.2d 768, 771 (D.C. Cir. 1988) (en banc). The court noted that disputes over assertedly deliberative material "can often be resolved by the simple test that factual material must be disclosed but advice and recommendations may be withheld." Id. at 774. However, the court noted that, in context, the information in the Regulation Log "would disclose that proposals have been made, and that these preliminary recommendations have been accepted or rejected, at various levels of review," as well as "the source of any decision not to regulate." Id. at 774-75. "The general views of the decision-maker on whether to regulate at all are often crucially important pieces of information about predecisional recommendations." Id. at 776. Further, "[w]hen . . . subordinates are reporting to superiors, disclosure could chill discussion at a time when agency opinions are fluid and tentative." Id. Finally, disclosure would place regulators on a "public time clock," since those concerned about regulatory "delay" could "quickly learn to identify and publicize the office or even the person they deem responsible. It strains credulity to believe that such attention would not lead to hasty and precipitous decision-making." Id. While based on a common law deliberative process privilege, rather than a constitutional claim of executive privilege, the Wolfe decision constitutes a recent judicial pronouncement on the importance of confidentiality in the deliberative process and suggests that even the fact that regulations are being submitted to OMB for review under Executive Order 12991, and the timing of such submissions, may be protected to ensure the integrity of the deliberative process.

We recognize that current requirements of the Paperwork Reduction Act potentially interfere to some extent with Executive branch deliberations. The Act provides that "[a]ny written communication to [OIRA] from any agency concerning a proposed information collection request, and any written communication from . . . the Office to such . . . agency concerning such proposal, shall be made available to the public." 44 U.S.C. § 3507(h). Other provisions are designed to reveal opposing views within the Executive branch. Thus, OMB is generally prohibited by the Act from disapproving an information collection request contained in an agency rule unless it has filed public comments during the rulemaking proceeding. Id. § 3504(h)(4). The agency must publicly explain why it rejected OMB's comments when it publishes the final rule. Id. § 3504(h)(3). OMB may still disapprove the rule if it finds the agency's responses to its comments to be "unreasonable." Id. § 3504(h)(5)(C). However, any OMB disapproval of an agency rule must be made publicly available together with the reasons therefor. Id. § 3504(h)(6). OMB must also publicly explain its approval or disapproval of other information collection requests submitted for review by an agency. Id. § 3507(b). Such requirements for public dissemination of debates between agencies are in tension with the President's authority, as head of a unitary Executive branch, to coordinate and supervise the public dissemination of his subordinates' views. See generally Myers v. United States, 272 U.S. 52, 163-64 (1926); Congress Constr. Corp. v. United States, 314 F.2d 527, 530-32 (Ct. Cl. 1963).[1]

Our difficulties with current law aside, however, the bill under consideration presents greater intrusions on the Executive branch deliberative process. S. 1742 would retain and expand the situations in which disagreements between OMB and an agency would be publicized. The rules governing initial approval of an information request contained in a rule would remain essentially unchanged. § 107(4). In addition, however, prior to the expiration of the control number for an information request contained in an agency rule, the agency would again have to publicly respond to any public comments filed by OIRA. OIRA would generally have to accept the agency's determination to continue the information collection unchanged unless the agency failed to follow the correct procedures or OIRA published a finding that the agency's decision and its response to comments were arbitrary and capricious. Id. As for agency information collection requests not contained in a rule, the agency would make a variety of certifications concerning the necessity and utility of the information collection prior to its submission to OIRA. § 106(5). These certifications would be part of the public record which OIRA and the agency would be required to maintain, which will be discussed below. OIRA would then have to publish an explanation of any disapproval or substantive modification of the agency's request. § 107(2)(B). Prior to expiration of the control number on the information collection request, the agency would again have to make the required certifications. § 107(3)(C). OIRA could then review the information collection, but would first have to publish a notice in the Federal Register stating the reasons for the review. Id.

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[1] We would have no objection to a provision requiring the agency to support its actions with an explanation, provided this explanation did not disclose predecisional deliberations.

While current law requires public files only for OIRA reviews under the Paperwork Reduction Act, S. 1742 would require a public file for any review conducted by OIRA. This would include regulatory reviews conducted under Executive Orders 12291 and 12498. Proposed § 3518(b) of Title 44, would read:

> [OIRA] shall establish and maintain a public file for each agency rulemaking activity submitted to [OIRA] for review. Such public file shall be placed in the [OIRA] reading room at the time the first document in the agency rulemaking activity is submitted to [OIRA] for review.

See § 112(2) (emphasis supplied). This provision would require a public file for OIRA review of agency regulations under Executive Orders 12291 and 12498, open to the public from the beginning of the review process. The file would be required to include, among other things, "any drafts of advanced notice or notice of rulemaking," "any proposed or final rule," and "all written material regardless of format concerning the agency rulemaking activity that is exchanged between" OIRA and the agency head. Id.[2]

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[2] Proposed § 3518(a) of Title 44 would read:

> In carrying out the functions under the provisions of this chapter, or undertaken by [OIRA] under any other provision of law, the Administrator shall establish and maintain a public file . . . .

See § 112(2). This file would include, among other things, "all written materials regardless of format related to any review (continued...)

Similarly, S. 1742 would amend 44 U.S.C. § 3506(d) to require that:

> In carrying out functions under this chapter and any other functions involving review (not specifically authorized by this chapter) by [OIRA] of agency activities, the head of each agency shall establish and maintain a public file for each agency activity under review by that office.

See § 106(4) (emphasis supplied). This file would include, among other things, "all written materials regardless of format" exchanged between OIRA and the agency, the name of the OIRA official to whom a submission is made, and "all changes in the agency activity made as a result of recommendations" by OIRA. *Id*.

These materials would clearly include predecisional policy judgments made by OMB and the agency. For instance, disclosing early drafts of proposed rules or identifying changes made in response to OIRA comments would reflect policy positions taken by the agency before a final decision had been reached. Further, the requirements for disclosure of "all written materials regardless of format" provides no basis for protecting policy views expressed by the agency and OIRA during the review process. The requirement for precise identification of the OIRA official responsible for recommendations from that office seems designed to further chill the deliberative process. Indeed, under the reasoning of the *Wolfe* decision, the very fact that an agency has

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[2] (...continued) activity" passing between OIRA and anyone outside OMB, the name of the OIRA person reviewing the submission, "copies of any changes made as a result of recommendations by [OIRA] in the review of an agency activity" and the reasons and authority for such changes, and an explanation of any approval, denial or disapproval of an information collection submission. *Id*. Proposed § 3518(a)'s requirement of a public file for OIRA reviews undertaken under a "provision of law" could conceivably be read to exclude reviews conducted pursuant to an Executive Order. However, as with current law, this requirement of a public file for "all written materials" is still an unwarranted invasion of the inter-agency deliberative process, even if the requirement relates only to reviews conducted under the Paperwork Reduction Act.

submitted a proposed rulemaking to OIRA for review should be protected to prevent the premature revelation of policy views.[3]

Statutory infringements on the confidentiality of the interagency deliberative process in any context damage the separation of powers established by the Constitution. This is particularly the case, however, for the review process conducted pursuant to Executive Orders 12291 and 12498. Under these orders, OMB is exercising the President's constitutional authority to supervise and guide his subordinates within the Executive branch. Such a proposal is a very serious intrusion into the President's constitutional prerogatives because it is squarely aimed at the President and his delegate, the Office of Management and Budget.

Our opposition to this proposal does not reflect any generalized policy of withholding information from Congress, or any unwillingness to recognize its legitimate responsibilities. As a matter of interbranch comity, we would expect that OMB would give careful consideration to any Congressional inquiries concerning individual reviews that it conducts. Such case-by-case determinations are far more appropriate in this highly sensitive area than the rigid requirements contemplated by this bill. To adopt the sweeping and uniform disclosure requirements proposed here would gravely compromise what the Supreme Court has termed the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions" in Executive decisionmaking, United States v. Nixon, 418 U.S. at 708.

II. Appointments Clause

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const., Art. II, § 2. "By its terms, the Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the

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[3] Title II of S. 1742 provides for the establishment of a Commission on Federal Information. The Commission would be empowered to hold hearings, subpoena evidence and witnesses, and issue reports. Most of the Commission members would be drawn from sources outside the Executive branch, such as the Senate, the House of Representatives, State and local government, and the public. The Commission would be given access to "such data, reports, and other information not otherwise prohibited by law as the Commission determines necessary to carry out its functions under [this] section." § 207(a)(emphasis supplied). We would interpret this provision as accommodating the President's constitutional authority to protect deliberative materials.

Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to the Congress as a whole in the process of choosing the person who will be nominated for appointment." Public Citizen v. United States Department of Justice, 109 S. Ct. 2558, 2581 (1989) (Kennedy, J., concurring).

The Administrator of OIRA is a principal officer, whose appointment is subject to the Senate's advice and consent. 44 U.S.C. § 3503(b). S. 1742 would require that the Administrator "be appointed with special attention to professional qualifications and credentials which may include education, work experience, or related professional activities required to administer the functions of [OIRA] described under this chapter." § 103. As a practical matter, the President would follow these guidelines regardless of the statute. Nevertheless, such statutory qualifications are objectionable on principle as an intrusion into the nominating process, which is constitutionally assigned to the President alone, and accordingly this provision should be deleted.[4]

III. Legislative Recommendations

The President has constitutional authority to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient." U.S. Const., Art. II, § 3 (emphasis supplied). Congress may not, therefore, require the President or his subordinates to make legislative recommendations. Further, as a necessary corollary, the President may submit legislative recommendations, such as a proposed annual budget, in the form he considers appropriate.

These constitutional principles are violated by certain requirements of S. 1742. For instance, § 110(2) would require the Administrator of OIRA to submit a report to two congressional committees "providing recommendations which would reduce the burden associated with [information collection] requests by 5 percent while providing adequate accountability of expenditures." Further, § 103 would provide that in preparation of the annual budget, "the Office of Information and Regulatory Affairs shall be included as a separate line item within the budget of the Office of Management and Budget." We recognize that similar provisions already exist in the statute, see, e.g., 44 U.S.C. § 3505(3)(F), and it has been the Department's longstanding view that such provisions must be construed as advisory rather than mandatory, to avoid raising the serious constitutional issue that the contrary construction would invite. See Machinists v. Street, 367 U.S. 740, 749 (1961). Nevertheless, it would be preferable to place the issue beyond question by deleting the provisions or revising them to provide for submission of the recommendations in question where the Administrator deems them appropriate.

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[4] The President has recently stated that statutorily-defined qualifications for a principal officer raise serious constitutional questions. See Presidential Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990, 25 Weekly Comp. Pres. Doc. 1851, 1852 (1989).

S. 1742 would require the Director of OMB to "recommend to the President, for submission to the Congress, legislative proposals to remove inconsistencies in laws and practices involving privacy, confidentiality, and disclosure of information." § 104(d)(3) (proposed § 3504(f)(6)). We believe that this provision passes constitutional muster under Article II, section 3, because it does not require the President to make the legislative proposals suggested by OMB. That OMB is required to "recommend" legislative proposals implies that the President is free to reject the recommendations. We are troubled, however, by the possibility that this provision could be read to restrict the content of advice given by OMB to the President. Congress may not, in our view, dictate the positions which must be taken by the President's advisors in assisting him to perform duties which the Constitution leaves to his sole discretion. Thus, we believe that this provision should be deleted or amended to clarify that OMB is free to submit recommendations to the President or not, as the Director chooses.

IV. Exemptions for Certain Activities

S. 1742 should contain specific language exempting those agencies (or components thereof) involved in intelligence gathering, criminal investigation, and law enforcement. The need for oversight of federal procurement and grant programs is acknowledged and is an appropriate goal, but additional provisions of the bill seem to promise unneeded interference with the intelligence and law enforcement communities. To protect the interests of the United States and its citizens, language which excludes the federal law enforcement, investigative, and law enforcement agencies from their provisions should be placed in the bill.

V. Added Burdens on Federal Agencies

One goal of S. 1742 is the reduction of paperwork and the gathering and maintenance of information which may be unnecessary. Presumably, the establishment of additional oversight and reporting functions is geared toward the elimination of unnecessary information systems and, thereby, the reduction of paperwork relative to these unnecessary information systems. The additional oversight and reporting functions, however, will generate more paperwork as Federal agencies are required repeatedly to justify their information systems.

Federal agencies, already faced with limited budgets and personnel reductions, cannot afford to maintain unnecessary information systems.

Additionally, if OMB is to assume oversight of information resource management, similar and concurrent oversight responsibilities of the General Services Administration must be eliminated or the reporting responsibilities of Federal agencies will be duplicated and the paperwork requirements of Federal agencies will be doubled.

VI. Meaning of "Public Information"

S. 1742 is unclear as to the type of information gathering and maintenance to which the bill refers. The bill initially refers to "public information" gathered by Federal agencies. Later in the bill, the expression "public information" is used interchangeably with the expression "government information." These two phrases are not synonymous. Public information, we would assume, is any information gathered and maintained by the Federal government which can be disseminated without harm to the interests of the United States. This type of information would include books, pamphlets and studies available from the Government Printing Office and other official news and information components of Federal agencies.

Government information, on the other hand, can be construed to mean any information gathered by Federal agencies, i.e., investigative data on defense procurement fraud or public integrity violations, the names of Federal employees whose daily jobs involve the processing of or access to sensitive or classified data, or the number and placement of computers used to process and store such information.

Specifically, S. 1742 provides that the Federal Information Locator System (FILS) is designed to assist agencies and the public in locating government information. Absent a precise definition of government information, this language can be interpreted to include any information maintained by the Federal government. Language in this bill describing the system states that the Administrator shall ensure that no information which is not public information is included in the system. Therefore, "public information" should be defined to guarantee that sensitive or private information will not be part of the FILS.

VII. Maintenance of Security and Privacy

Provisions of the bill for maintenance of files open for public inspection may pose problems in the areas of security and privacy. For instance, one provision of S. 1742 requires a systematic inventory and the maintenance of current records of an agency's information resources, including the agency's information-skilled personnel "for use in developing and updating the agency's information resources management plans and for informing relevant public outside the agency." § 106(3). In the intelligence and law enforcement communities, the identification of employees who have access to sensitive or classified information may place these employees at risk.

VIII. Paperwork Reduction Goals

The Paperwork Reduction Goals and Deadlines section of S. 1742 sets a burden reduction goal of 5 percent by September 30, 1990, as well as 5 percent reductions for each of the two fiscal years following. These are arbitrary numbers which do not take into consideration the past reductions made by an agency. Ideally, these reduction goals should be aggregated with past reduction percentages for a total reduction goal since the inception of the Paperwork Reduction Act(s) which would give a truer picture of an agency's reduction effort.

IX. Limiting Three-Year Maximum Approval Periods

The changes in S. 1742 to 44 U.S.C. § 3507(d)(1) that would limit the three-year maximum approval period to information collections not "required by a rule" needs to be better defined or deleted. § 107(3)(B). A statutory distinction tied to information collections "required" or "not required" by a rule is unmanageable and impossible to define inasmuch as almost all agency activity is authorized, required or otherwise derived from some form of rule or rulemaking authority. It is unclear as to any distinction between an information collection contained in a rule and one required by a rule.

X. Thirty-Day Notice of OMB Information Collection Review

A change in S. 1742 to 44 U.S.C. § 3507(a) appears to require an agency to give the public a 30-day Federal Register notice before submitting a clearance package to OMB for review. § 107(1)(A)(iii). Another change to subsection (a) appears to require a 30-day notice after submission of a clearance package to OMB. § 107(1)(B). A change to subsection (b) requires OMB to wait for 30-days, until after a 30-day public comment period is concluded, before notifying the agency of its decision. § 107(2)(A). Section 107(1)(A)(iii) is basically duplicative and should be deleted. In addition, the bill needs to be amended to allow that in cases of health, safety, or other emergency, see 44 U.S.C. § 3507(g), neither the agency nor OMB would be subject to the 30-day waiting period.

Conclusion

In summary, the Department of Justice has basic objections to S. 1742, particularly in its treatment of the inter-agency deliberative process. Unless fundamental problems in the bill are addressed, the Department would be constrained to advise that it be disapproved if it were presented to the President. The Office of Management and Budget has advised that there is no objection to the submission of this report and that enactment of S. 1742 in its present form would not be in accordance with the program of the President.

Sincerely,

Bruce C. Navarro

Bruce C. Navarro
Acting Assistant Attorney General

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

December 18, 1989

The Honorable John Glenn, Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am responding to your November 6, 1989 request for the Nuclear Regulatory Commission's (NRC's) views on S. 1742, the "Federal Information Resources Management Act of 1989". The Commission has reviewed the bill and is satisfied that the proposed amendments to the Paperwork Reduction Act will encourage continued efforts to reduce the Federal Government's demands for information from the private sector, yet at the same time will not impose unreasonable procedural requirements which would preclude the NRC from obtaining information needed to carry out its public health and safety mission. However, we recommend several changes that we believe would improve the legislation. Our detailed comments on S. 1742 are enclosed.

If you or other members of the Committee would like additional information from the NRC, please contact me.

Sincerely,

Kenneth M. Carr

Kenneth M. Carr

Enclosure: Detailed NRC comments

cc: Senator William V. Roth, Jr.

Detailed Nuclear Regulatory Commission Comments on S. 1742

1. Section 3507(d)(2) establishes a new certification process which purports to offer a streamlined method for renewing OMB approval of existing information collections. While we support the objective, we note that the process requires public comment, consideration of comments submitted, and submittal of a certification to OMB attesting to agency compliance with section 3506(a) sixty days prior to the expiration of the OMB control number. OMB would continue to retain the authority to require the agency to submit its information collection package for its review, even if the self-certification process is followed. Thus, the self-certification process appears to offer no advantage over the alternative renewal process provided for in the bill which requires OMB approval in each instance. In fact, in some instances it could increase the burden on the agency seeking the information collection renewal and prolong the process for OMB approval of the renewal. Therefore, we request that further consideration be given to streamlining the self-certification alternative to make it more attractive.

2. The bill establishes two procedures for renewing currently approved information collections -- a process for renewing those collections that are required by rule (section 3507 (j)) and a different process for those information collections requirements that are not required by rule (section 3507(d)(2)(A)). We recommend that the bill be revised to provide a single process for renewal and suggest that the process be the one prescribed for rule collections (section 3057(j)).

3. The Paperwork Reduction Act in section 3507(c) provides that independent regulatory agencies, such as the NRC, have the authority to collect information over OMB's objections, if the independent regulatory agency disagrees with OMB's determination. We support the retention of this provision. However, given the revisions to the information collection renewal process, it would be useful to make note of this override authority. We, therefore, suggest that section 3507(j) be revised by adding at the end of the existing sentence the words "or the authority of independent regulatory agencies under section 3507(c)."

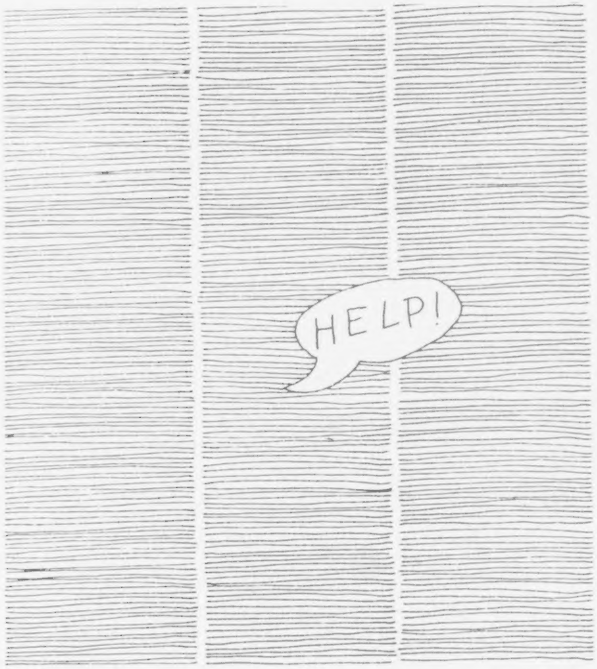
Business Council on the Reduction of Paperwork
1625 I Street, N.W., Suite 903, Washington, D.C. 20006 - 202/331-1915

STATEMENT BY MARK E. RICHARDSON, EXECUTIVE DIRECTOR, BUSINESS COUNCIL ON the REDUCTION of PAPERWORK (BCORP)

BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

REGARDING S.1742
THE FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

February 21 and 22, 1990



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1625 I Street, N.W., Suite 903, Washington, D.C. 20006 - 202/331-1915

STATEMENT BY MARK E. RICHARDSON, EXECUTIVE DIRECTOR, BUSINESS COUNCIL ON the REDUCTION of PAPERWORK (BCORP)*

BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

REGARDING S.1742
THE FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

February 21 and 22, 1990

Mr. Chairman and Members of this Committee:

BCORP appreciates this opportunity to express our views regarding S.1742, the proposed Federal Information Resources Management Act.

We have reviewed the proposed legislation and are pleased to note that in the development of the bill certain matters which we consider of importance were addressed.

We applaud in particular S.1742's amendments to Section 3506 of the Paperwork Reduction Act (PRA) to place greater emphasis on the responsibilities of agencies to assure the public better access and fuller participation in the process of developing information collections.

We also concur with, and support, the proposal embodied in Section 3506(e) that an "independent" official within an agency should have the responsibility of assuring that each information collection of the agency meets the tests of the "necessity" and "practical utility."

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* The Business Council On the Reduction of Paperwork was established in 1942, at the suggestion of President Franklin D. Roosevelt, following passage of the Federal Reports Act. In the subsequent 48 years it has served as the prime vehicle for the community of respondents to Federal questionnaires to communicate their concerns regarding Federal information collections to the governmental authorities involved in the process of trying to minimize unnecessary and duplicative paperwork.

We do feel, however, that in the development of this proposed legislation not enough attention has been given to the enormous burdens imposed on individuals, state and local governments, universities, and the private sector. Many of these burdens, listed by OMB as 6.2 BILLION HOURS annually--a figure less than half the actual 13 billion burden hours--are the result of ill-thought-out Federal agency information collections and recordkeeping requirements.

For many individuals, small businesses, and companies engaged in Federal procurement or international trade, the requirements of unnecessary and duplicative information and recordkeeping are now at a chokepoint and are clearly affecting our competitiveness in a global economy. Yet not one agency has been called upon to explain why it has not cured one or more of the well-known over-reaching situations that abound.

We would suggest, for example, that the Labor Department be asked to explain the totally inexcusable ERISA form 5500 which is now, we have been given to understand, used as a case study in universities.

In our review we have noted that several key aspects of S.1742 run counter to Congressional thinking going back as far as 1942 regarding how best to bring about meaningful reductions in unnecessary, wasteful, or duplicative paperwork and prevent unnecessary recordkeeping. The current answer is to assure independent review of agency paperwork actions.

As most recently spelled out in the Paperwork Reduction Reauthorization Act of 1986 (PRRA Section 3507(e)), the Congressional view has been that it is necessary to have outside reviews of information collection and recordkeeping requirements--unless an agency is willing to demonstrate that "a senior official of an agency * * * is sufficiently independent of program responsibility * * * and has sufficient resources to carry out this responsibility [paperwork reduction] effectively."

This legislation abandons those concepts, choosing instead to rely on a system of "self-certification" by the agencies that is not even subject to annual review and report by the agencies' Inspectors General regarding compliance with the requirements of the PRA. Under S.1742, agencies would not be required to prove "independence" and "sufficient resources" in order to be permitted to "self-certify" that there has been compliance with the PRA.

BCORP does not feel that such an approach is realistic given the past history and current actions of most agencies which all too frequently do not even minimally concern themselves with the burden on respondents and recordkeepers.

The proposed legislation changes the current law so as to apply the three-year maximum approval period solely to information collections not "required by a rule." Since the vast majority of all collections are required by a rule--and the remainder could be made to be so required--this change amounts to eliminating the three-year approval cycle.

BCORP also has serious concerns about the potential under S.1742 for loss of confidential status for information supplied to agencies. Even under current safeguards, some agencies are notorious for their release of confidential and/or proprietary information in total disregard of the law. Unfortunately, in its desire to assure better dissemination of government data, S.1742 has opened the door for a number of additional opportunities for the loss of sensitive and confidential information. We urge that any legislation in the area of information collection give realistic attention to the currently dangerous flow of confidental and/or proprietary information into improper hands.

Any discussion of the "leakage" of confidential information leads naturally to the broader issue of the damage done to America's competitve position in global trade due to poorly designed, extremely burdensome, and excessively probing governmental questionnaires.

It is time for Congress to face up to the propensity of some agencies to burden U.S. companies engaged in world trade with exhaustive information collections that add immensely to the cost of domestic production, placing the U.S. at a severe competitive disadvantage.

Marketing plans and confidental corporate financial data are pursued by agencies without any demonstrable legitimate interest in such matters, simply because such information "might prove useful."

Former Senator Paul Tsongas of Massachusetts recently noted that Main Street America is more aware of the danger of the nation's "economic decline" than either end of Pennsylvania Avenue. Said Tsongas, "It is almost like Washington is pre-Pearl Harbor and the rest of us are post-Pearl Harbor."

With Federal paperwork now amounting to over 7% of the nation's GNP we have an economic Pearl Harbor facing our economy and it is time to move to strengthen the PRA. BCORP finds some Pearl Harbor aspects in certain provisions of S.1742.

- The provisions of Section 3507(d) that would abolish the current three-year cycle of information collection renewals and review. This removal of the so-called "sunset" provisions of the PRA will clearly give impetus to agencies not to review their collections and make necessary and logical changes, and will negate any opportunity for the public to participate in a meaningful way in eliminating unecessary and duplicative collections.

- The provisions of Section 3507(j) that would limit the role of OMB in the agencies' self-certification process to instances where agency data collections were found to be "arbitrary and capricious." This standard effectively negates the tests of "necessity" and "practical utility," and as such amounts to the elimination of any meaningful review of agency "self-policing."

BCORP is deeply concerned over the period of inaction that occurs each time Reauthorization becomes a matter of contention. We feel that there should be permanent reauthorization, and that this Committee should carry out its responsibilities by holding regular and meaningful oversight hearings which devote time and attention to the matters of information collection and recordkeeping covered by the PRA, and to the rapidly increasing burdens that are being placed on the public.

We thank the Committee for this opportunity to express our views on S.1742, the Federal Information Resources Management Act.

AMERICAN ASSOCIATION OF LAW LIBRARIES
ASSOCIATION OF RESEARCH LIBRARIES
SPECIAL LIBRARIES ASSOCIATION

The Honorable Senator John Glenn
Chairman of the Senate Committee
on Governmental Affairs
SH-503 Hart Senate
Office Building
Washington, D.C. 20510-3501

February 28, 1990

Dear Senator Glenn:

The purpose of this letter is to present the views of the American Association of Law Libraries (AALL), the Association of Research Libraries (ARL), and the Special Libraries Association (SLA) on S. 1742, the Federal Information Resources Management Act. We support the work of the Subcommittee to update the existing statute, in particular, the dissemination provisions of this legislation.

New information technologies and the increasing information needs of our society call for a coherent Federal information policy - a policy that encompasses the collection, management, and dissemination of public information. S. 1742, the Federal Information Resources Management Act, is an important step torward this policy. We commend Senator Bingaman and his staff for developing a bill which will lay the foundation of this policy and, at the same time, address many long standing information management concerns of the Federal Government.

The AALL, the ARL and the SLA support the underlying philosophy and goals of S. 1742 - that the Federal government should manage its information from a "life cycle" perspective. Our remarks on S. 1742 focus on three important objectives which should be reflected in the dissemination section of the bill:

- the infrastructure for disseminating Federal information must promote equitable access to government information and public accountability over information managers,

- the traditional relationship between official and commercial providers of government information should be preserved, and

- the Federal Depository Library Program should remain the primary public access channel to government information.

First, equitable access to government information must remain the cornerstone of Federal information policies. The detrimental effects of recent policies on information dissemination are clear - under the current law neither OMB nor certain Federal agencies have properly performed their dissemination responsibilities. Instead, OMB systematically sought to reduce government dissemination programs in favor of private sector efforts. Some agencies jettisoned publication programs under budget pressure. Without public comment, much public information was effectively removed from the public domain.

The new infrastructure for managing Federal information should be built upon existing Congressional policies. In particular, the new framework, should rest on the following working principles:

- primary responsibility for disseminating agency information should rest with Federal agencies and not with OMB,
- OMB should play a supportive role in coordinating agency efforts to maximize the availablity of government information to the public, and
- Congress should aggressively oversee OMB and agency dissemination policies and practices.

Agencies are in the best position to judge how to disseminate their information products and services to meet both their missions and public information needs. OMB should not micro-manage agencies programs by determining the content or format of specific information products or services.

OMB should coordinate Federal agency dissemination efforts. OMB guidance to agencies under this law should serve a single purpose - to encourage agencies to disseminate public information on an equitable basis to all persons.

Finally, Congress - as the guardian of the public interest - can ensure through legislation and oversight that government information is available to all citizens at no fee or low cost.

Second, AALL, ARL and SLA are particularly concerned about the section of S. 1742 which mandates that before an agency can issue its own information product or service, the agency must consider if there is an equivalent public or private source for the same information. (See: S. 1742 at P. 18; L. 21-25.)

Potentially this section elevates the private sector to an unprecedented primary role in publishing government information.

For over two centuries, private firms have played an important - but decidedly secondary - role in the publication of government documents. The emerging Federal law should not disturb this tradition by attempting to imply a role for private firms which are under no statutory duty to disseminate information to citizens.

Please delete this paragraph and acknowledge by silence the traditional role of private enterprise. If such a change is not practicable, we ask to consider the following alternative language for the paragraph:

> (iv) whether an equivalent information product or service is available from another source, and whether that product or service reasonably meets the dissemination objectives of the agency and the needs of the public, including dissemination objectives for the public through the Federal Depository Library Program established under this title;

There are several positive aspects to this alternative language. Without elevating the private sector to a new statutory role, the provision effectively discourages unnecessary duplicate information products. Moreover, the language measures the accessibility of an existing product or service in terms of a traditional bench-mark of information access - the Federal Depository Library Program.

Finally, the Federal Depository Library Program - the Congressional program for no-fee access to government information - should remain the primary channel of public information. The success of the depository program is evident from its large clientel - more than 167, 000 users each week. Yet, in spite of the public's acceptance of the program, agencies send less and less material through the depository network. This, of course, has a ripple effect on our culture, economy and polity. Citizens can less easily examine the activities of their government. Scholars lose information that may be the grist of novel research. Businesses across our nation are denied data that might make them more competitive against foreign firms.

AALL, ARL and SLA endorse the provision in S. 1742 which requires Federal agencies to provide the Superintendent of Documents with all agency publications for distribution through the Federal Depository Library Program. (See: S. 1742 at P. 24; L. 3-6). However, this paragraph should be strengthened to be truly effective. The paragraph should read:

> "(D) provide to the Superintendent of Documents for distribution to the Federal Depository Library Program all publications required by chapter 19 of this title to be made available, including publications in electronic formats;

This language would permit the continuation of projects on electronic publications that are now in progress at Depository Libraries. These projects have been endorsed by several committees of Congress, including both House and Senate Appropriations Committees and the Joint Committee on Printing. Also, this language will dovetail S. 1742 with other laws governing the Depository Library Program. These laws are now undergoing Congressional review to amend them to meet the nation's information needs.

We appreciate this opportunity to present our views and concerns to the Committee. We hope these comments are helpful and we are prepared to work with the Committee to improve S. 1742

Sincerely,

Dick Danner

Dick Danner
President
American Association of Law Libraries

Duane E. Webster
Executive Director
Association of Research Libraries

David R. Bender

David R. Bender
Executive Director
Special Libraries Association

The **American Association of Law Libraries (AALL)** is a organization of 4,700 individuals connected with a law library or collection. The organization promotes librarianship, develops and increases the usefulness of law libraries, cultivates the science of law librarianship, and fosters a spirit of cooperation among members of the profession. Contact AALL at 53 West Jackson Boulevard, Suite 940, Chicago, Ill. 60604 (312) 939-4764, or c/o Robert Oakley, Georgetown University Law Library, (202) 662-9160.

The **Association of Research Libraries (ARL)** is an organization of 119 major research institutions committed to strengthening and expanding the capacities of research libraries to contribute to the educational mission of the institution. Contact ARL at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036 (202) 232-2466.

The **Special Libraries Association (SLA)** is an international organization of more than 12,000 librarians, information managers, and brokers. The Association is concerned with the advancement and improvement of communications and dissemination and ultimate use of information and knowledge for the welfare of all users. Contact SLA at 1700 18th Street, N.W., Washington, D.C. 20009 (202) 234-4700.

STATE OF OHIO
Office of the Treasurer

MARY ELLEN WITHROW
Treasurer of State

February 26, 1990

Honorable John Glenn
Chairman
Committee on Governmental Affairs
SD-340 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Senator Glenn:

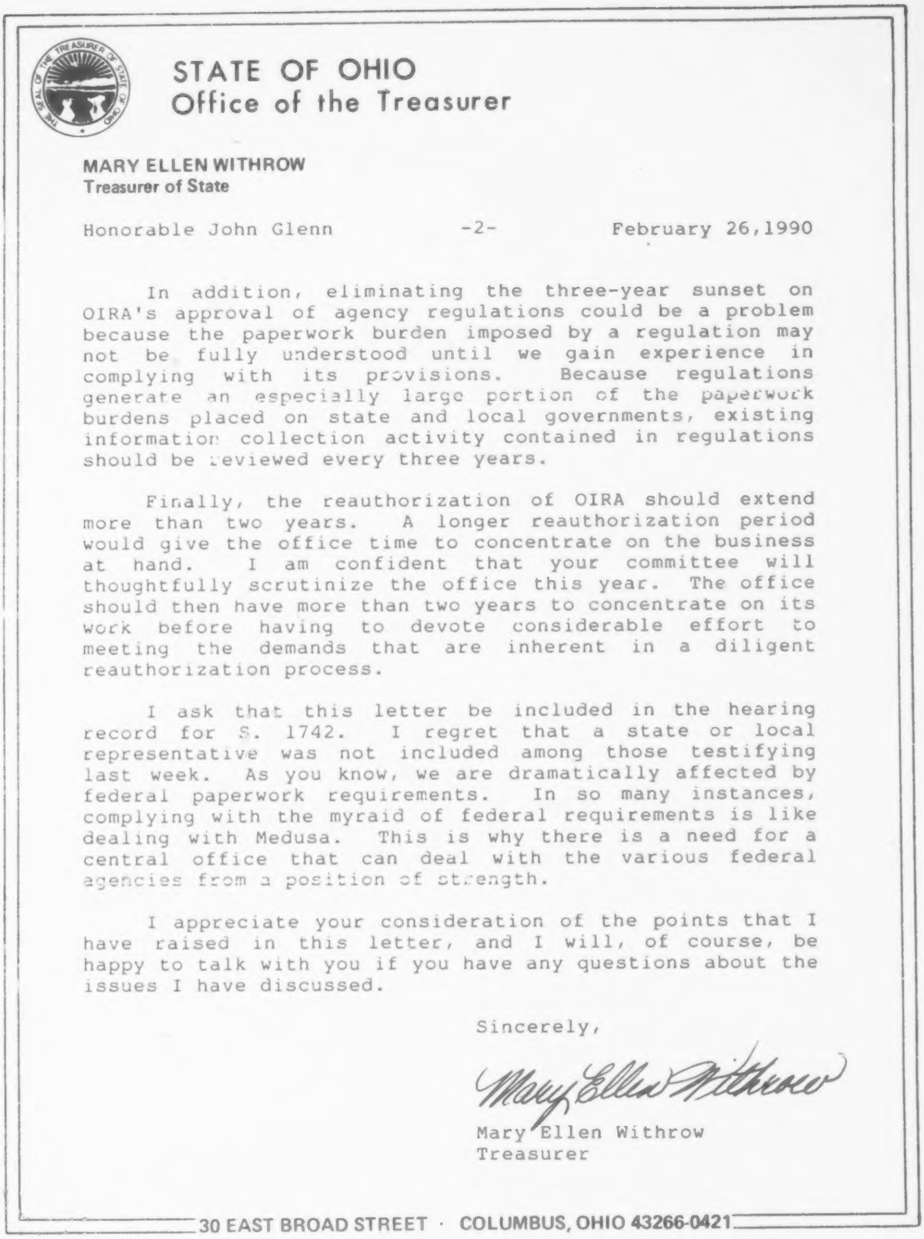
I am writing with regard to the paperwork reduction provisions of S. 1742, "The Federal Information Resources Management Act." The Reauthorization of OMB's current authority under the Paperwork Reduction Act (PRA) is of special importance to states. As findings in S. 1742 indicate, "...more needs to be done to reduce the paperwork burden on... state and local governments, particularly with respect to the burden associated with federal procurement and grant programs."

Before commenting on specific provisions in the bill, I would like to make some observations about the importance of OMB retaining a strong, central role in the issuance of federal regulations. OMB should be an independent check on agencies' information collection activity. This will help assure that all views on an information collection activity are taken into account, even if voiced by an entity that has little history of involvement or rapport with a particular agency. As you commented to Dr. William Hirzy during his testimony on February 23, 1990, we are not a government of personalities. We ae a government of laws. I urge you to retain OMB's as an independent check on federal agencies, as established in current law.

In addition, I think some comment is warranted on the following specific provisions of S. 1742:

The arbitrary and capricious standard that the bill would establish for the Office of Information and Regulatory Affairs (OIRA) to overrule an agency's self-certification of an information collection activity is too stringent. This standard would weaken the President's authority under the PRA. The President needs a strong executive office to assure that information collection activities do not duplicate information already being gathered and to help assure that they do not place an unnecessary burden on state and local governments and the public. Federal information collections should be necessary and have practical utility.

30 EAST BROAD STREET · COLUMBUS, OHIO 43266-0421



STATE OF OHIO
Office of the Treasurer

MARY ELLEN WITHROW
Treasurer of State

Honorable John Glenn -2- February 26,1990

In addition, eliminating the three-year sunset on OIRA's approval of agency regulations could be a problem because the paperwork burden imposed by a regulation may not be fully understood until we gain experience in complying with its provisions. Because regulations generate an especially large portion of the paperwork burdens placed on state and local governments, existing information collection activity contained in regulations should be reviewed every three years.

Finally, the reauthorization of OIRA should extend more than two years. A longer reauthorization period would give the office time to concentrate on the business at hand. I am confident that your committee will thoughtfully scrutinize the office this year. The office should then have more than two years to concentrate on its work before having to devote considerable effort to meeting the demands that are inherent in a diligent reauthorization process.

I ask that this letter be included in the hearing record for S. 1742. I regret that a state or local representative was not included among those testifying last week. As you know, we are dramatically affected by federal paperwork requirements. In so many instances, complying with the myraid of federal requirements is like dealing with Medusa. This is why there is a need for a central office that can deal with the various federal agencies from a position of strength.

I appreciate your consideration of the points that I have raised in this letter, and I will, of course, be happy to talk with you if you have any questions about the issues I have discussed.

Sincerely,

Mary Ellen Withrow

Mary Ellen Withrow
Treasurer

30 EAST BROAD STREET · COLUMBUS, OHIO 43266-0421

The Johns Hopkins University

Office of Sponsored Projects
John Dearden, Director

Baltimore, Maryland 21218
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March 8, 1990

The Honorable John Glenn
Chairman
Committee on Government Affairs
United States Senate
340 Senate Dirksen Office Building
Washington, D.C. 20510-6250

Dear Senator Glenn:

Please let me thank you for inviting me to submit testimony to the Committee for the Hearing record regarding S.1742. The consideration of amendments to the Paperwork Reduction Act and the reauthorization of the Office of Information and Regulatory Affairs (OIRA) in OMB are issues of great importance to The Johns Hopkins University.

Allow me to also remark that I and several other representatives of major research universities and university associations met with members of your staff and Senator Bingaman's staff during the drafting of S.1742 to communicate our interests and concerns regarding amending the Paperwork Reduction Act and reauthorizing OIRA. It has been gratifying to find that many of our suggestions have been incorporated into S.1742; however, certain issues remain of concern to us, and I shall address them herein.

My comments provide a perspective gained during a total of more than twenty-five years of direct involvement in and with federally-supported and regulated academic research. I have been a staff member of a major DOE-funded thermonuclear fusion laboratory, the project manager of a $15 million dollar balloon-borne telescope project funded jointly by NSF, NASA and ONR, and have been a senior administrative officer in the divisions and the central administration of two major research universities, Princeton and Johns Hopkins. In my present position at Johns Hopkins, I deal with policy development and implementation issues regarding research, and am responsible for the institutional interface with the external sponsors and regulators of academic research.

Johns Hopkins is an extremely research-intensive university, and its enterprises extend over virtually the entire spectrum of modern academic research and training. Our primary mission and function is to produce new knowledge and highly-skilled professionals in science and technology. This occurs primarily through sponsored research projects. At present we have approximately 6000 total research awards that accounted for more than 600 million dollars in expenditures in the year ended June 30, 1989. These projects involved nearly 3000 faculty principal investigators and approximately 5000 other professional scientific and technical staff. This activity is preponderantly supported by federal grants, contracts, and cooperative agreements; there are approximately 150 different federal sponsors of current Hopkins research projects, and we are necessarily involved with many other federal regulatory, oversight, and administrative offices.

The point of these facts is that at Hopkins, we are keenly aware of and involved in Federal information collection, record-keeping, reporting and administrative requirements, all of which fall within the purview of the Paperwork Reduction Act and OIRA. We deal with dozens of different federal agencies, offices, and programs, and each has particular needs and objectives. Each has legitimate regulatory functions to perform in its stewardship of public funds and to assure compliance with agency mission requirements and policy objectives, and these often overlap within and between agencies in complicated ways. Collectively, the agency regulatory and administrative demands on sponsored research have resulted in what has been termed extreme bureaucratic accretion, which has been recognized as so serious a national problem that the National Academy of Sciences in 1985 convened a conference devoted entirely to exploring means of dealing with it. Various efforts have been taken to address the problem, such as the joint National Science Foundation - Association of American Universities (AAU) experiment in simplification of research grant administration; The Florida Demonstration Project in standardization and simplification of agency requirements, and it's follow-on, The Federal Demonstration Project. Congress has contributed to these efforts, in such legislation as the Federal Grants and Cooperative Agreement Act, and, most appropriately, the Paperwork Reduction Act.

Although other entities, such as OMB and even the universities, have contributed to the situation, the great majority of the paperwork and information burdens which are the substance of bureaucratic excess and accretion in Federally sponsored research originates with the Federal agencies. This was very difficult to deal with prior to the enactment of the Paperwork Reduction Act; recourse against excessive paperwork and bureaucratic demands was largely limited to directing strenuous persuasion and appeals to logic to various offices in each agency. And this process itself was made exceedingly difficult because there was no central point of authority in the Federal government to which research universities and researchers could turn for relief from excessive paperwork and related burdens. The Paperwork Reduction Act thus provided sorely needed information collection standards, guidelines, and most importantly limits. Equally important, it created the central oversight Office of Information and Regulatory Affairs (OIRA). The Act as implemented by OIRA has worked to the benefit of the research university community and the Federal government. The benefits did not occur instantaneously; OIRA, the agencies and the universities have been undergoing continuing learning, testing and evolution. The process hasn't produced perfect results, but on balance, I believe the results have been overwhelmingly positive and beneficial.

For example, by the early 1980's certain federal mission agencies required horrendously detailed and frequent accounting of equipment purchased under research contracts and grants. In some instances, monthly, semi-annual, and annual inventories were required, often with detailed justifications and descriptions of even grantee-fabricated equipment. This was done to maintain the possibility of the sponsoring agency claiming and using the equipment elsewhere after the end of the original research project. However, a 1982 survey of thirteen research universities revealed that out of tens of thousands of pieces of equipment subject to such reporting requirements over several years, fewer than twenty were returned to an agency. In fact, for virtually all the others, title was ultimately transferred to the grantee institution - which was also a lengthy bureaucratic process. Working with OIRA, and utilizing the Federal Grants and Cooperative Agreement Act as well as the Paperwork Reduction Act, the research community has gradually reduced property accounting and reporting requirements to much more sensible levels.

Agency implementation of regulatory oversight and management functions relies primarily upon requiring information development, collection and reporting by funding recipients and regulated entities. To the degree that such requirements are in any way duplicative, excessive, unnecessary or not cost-effective, they constitute non-productive consumption of Federal resources. And in the instance of sponsored research, they often force research personnel to devote considerable and ongoing efforts to administrative matters rather than scientific or technical activities. That means that the Federal government gets less research for its dollar, research progress and productivity is impeded, and the administrative components of research costs increase. Indeed, a study undertaken by eight research universities in 1986 at the request of Senator Lawton Chiles found, for example, that one particular unnecessary administrative reporting requirement resulted in an annual diversion at least 600,000 hours of researchers' time from science to administration. Such effects of bureaucratic excess and accretion on research are undesirable at any time, but are more acutely so in these times of serious Federal fiscal constraints and intensifying international competition in science and technology.

The information collection, reporting and record-keeping requirements which research universities receive from Federal agencies and offices range from various policy representations and certifications, to financial and property accounting, to administrative and personnel matters, to substantive issues regarding research such as: human subjects; animal experimentation; artificially recombinant DNA; bio-hazardous materials; radioactive materials; inventions, patents and intellectual property; research equipment and facilities; etc., etc. - the topics are virtually endless. Unfortunately, it has all too often been the case that different agencies will each require redundant identical or slightly different variations of the same or similar information; or, an agency will require information of very questionable utility. And it is in such instances that the Paperwork Reduction Act and OIRA have been valuable assets to the research university community.

The Paperwork Reduction Act, as now written, requires agencies to submit information collection requests, including pertinent regulations and other materials, to OIRA for review, and to provide interested parties with meaningful opportunity to comment. And, proposed agency rules subject to OIRA review under other authority are no less subject to the criteria and standards of the Paperwork Reduction Act. Under those standards, agency information collection requests and requirements must be cost-effective, non-duplicative or redundant, necessary to the agency mission, and not overly burdensome. In the context of federal sponsorship and regulation of academic research at Johns Hopkins, the public participation requirements and the standards set by the Act have provided valuable opportunities for public involvement in rule-making, and our experience is that OIRA functions to help ensure that agencies meet their statutory obligations. OIRA has helped to preserve and protect the integrity of the public comment process, and to assure that federal information collection requests, based in regulation or otherwise, are necessary, non-duplicative, and cost-effective in the government-wide context.

Federal information collection requirements are generally the implementing means to substantive regulatory ends, and in that context information policy and agency rules and policies are inextricably intertwined; de facto, they constitute an integrated management system. Thus, the Paperwork Reduction Act, by ensuring opportunity for public comment, has strengthened the effectiveness of public input to the regulatory process. The Act's focus on information development, collection and reporting requirements, and the involvement of OIRA, literally assures the public of a forum for comment to be received and considered by a Federal Office other than only the specific issuing agency, regardless of the substantive focus of a rule. That fact has provided a measure of long-needed balance and equity in the federal regulatory system. The involvement of OIRA also ensures that a government-wide perspective will be applied to information collection requirements, and that to some degree fairly uniform standards will be applied to and by dozens of otherwise independently functioning agencies and offices. With regards to effective public participation on regulatory and paperwork issues affecting research universities, the situation that now exists with OIRA involved is a significant improvement over the prior case of dealing only with agencies.

Issues of Concern. Although there are certain elements which are clearly improvements to the Act, notably the provisions for better access to agency electronic data files and for improving information dissemination, from the perspective of performance, management and administration of research, S.1742 raises concerns. These relate to the apparent intent of the draft to reduce the scope of OMB/OIRA responsibility and authority regarding agency information collection, and to enhance the independent authority and discretion of the agencies. S.1742 would significantly shift the burden of proof from the agency in demonstrating necessity, practical utility, cost-effectiveness, etc., to OMB in justifying each disapproval of proposed agency information collection, and the discretionary authority of OIRA to disapprove would be sharply limited to narrow criteria.

We also note that S.1742, in title and content, de-emphasizes the importance of paperwork reduction. The history of excessive Federal paperwork requirements and other "red tape" continues to grow. The original decision of the Congress to enact the Paperwork Reduction Act was based in the still-inescapable conclusion that agencies' information collection had to be constrained and the public had to be protected from excessive requirements; that is even more important today, if we are to efficiently and effectively compete in an international economy. While we agree that information management is conceptually and substantially important, we urge that S.1742 be retitled and revised to restore the emphasis on paperwork reduction.

S.1742 revises the triennial review provisions of the Act in a way that would leave researchers and institutions with virtually no protection against a most numerous and onerous type of agency excess regarding information collection: cumulative, pre-existing requirements found in or arising from agency rules and regulatory actions. The Bill would allow agencies to independently certify the need to continue such information requirements, regardless of OMB or public comment to the contrary, unless OMB can show that such agency action is "arbitrary and capricious." This would effectively nullify the public protection provisions of the present Act by enabling agencies to continue and enforce information collection requirements that may have become unnecessary, redundant, or of little practical utility. This particular weakening and limiting of OIRA's authority and responsibility would seriously reduce the effectiveness of the Act in curbing bureaucratic accretion and excess. The standards of reasonableness, necessity, timely practical utility and non-duplicative cost-effectiveness are as valid for continuing information collection requests as they are for proposed new requirements. Thus, we urge that "arbitrary and capricious" agency response to public comments at triennial review be eliminated as the sole basis for OMB action, and we strongly urge that OMB retain its authority to disapprove all information collection requests, whether new, continuing or proposed.

We are concerned that the revisions to Section 3517 by S. 1742 may de-emphasize and reduce the requirements for public comment and participation "in development of information policies, plans, rules, regulations, procedures, and guidelines and in reviewing information collection requests." In a similar vein, we are further concerned that section 3518 in S.1742 is excessive in limiting public access in OIRA to the Administrator or his Deputy regarding regulations under review. This would have the practical effort of greatly impeding or eliminating meaningful discourse and input by the public on many issues of significant scope and interest. We urge that public access to OIRA regarding regulatory review not be limited.

S.1742 would impose a thirty or sixty day limit on the OMB regulatory review process. This is unrealistically short. Regulations typically involve very complicated issues, processes or substantive areas. Time is needed, and is well-spent, for proceeding with a deliberative and prudent review and revision process. We strongly urge the caps on the regulatory review period be eliminated.

Finally, we question the advisability of a two-year authorization for OIRA. The value of OIRA and its functions are, we believe, well-demonstrated and warrant a much longer authorization period, perhaps even a permanent reauthorization. And since S.1742 would establish the OIRA budget as a line item in the OMB budget, it is likely that much appropriate Congressional review would occur with the Federal budget cycle.

In conclusion, allow me to reiterate that the Act and OIRA have demonstrated their value in areas critical to research productivity and cost-effectiveness, and thereby their value to national competitiveness in science and technology. Allow me, therefore, to again urge the reauthorization of OIRA with its present responsibilities and authority fully intact.

Thank you again for the opportunity to provide this testimony.

Sincerely,

John Dearden

John Dearden
Director

cc: Member of the Senate Committee
on Government Affairs

COGR
an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS
One Dupont Circle, N.W., Suite 670
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February 16, 1990

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The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510-6250

Dear Senator Glenn:

On behalf of the Council on Governmental Relations, an association of more than 130 private and public universities and colleges throughout the United States, I write in support of the Paperwork Reduction Act and reauthorization of financing for the Office of Information and Regulatory Affairs (OIRA). We understand that the Committee is considering S. 1742, the Federal Information Resources Management Act of 1989, and that the companion legislation to this bill is H.R. 3695. We offer the following comments.

We believe it is important that Congress reauthorize OIRA and send a strong signal with any amendments to the Paperwork Act that the present purposes of the Act be vigorously pursued by both OIRA and the other executive branch agencies.

OIRA performs a unique function to assure that the requests for information collection are reasonable, that they are based on need and not duplicative. Colleges and universities must respond to government requests for information of all kinds and from nearly all agencies. The Act requires agencies to justify proposals for regulatory paperwork in terms of necessity, practical utility, and least burden; provide us an opportunity to comment; and subject them for OIRA review and approval. Public protection is provided if agencies do not engage in this process.

We also see the OIRA playing the critical role of "court of last resort" when agencies do not seek meaningful public comment, or fail to take into consideration substantive comments given to them in their development of regulatory and administrative requirements.

We support maintaining the integrity of the paperwork clearance process. OIRA operates as a check-and-balance in this process to what could otherwise be unreasonable or excessive legislative-like requirements promulgated by the agencies. As we find ourselves in discussions with agencies over whether their proposed regulations go beyond the intent of Congress or the law, it is helpful to have an outside arbiter who is not involved in the funding process.

National Association of College and University Business Officers

Moreover, the regulatory requirements associated with grants and contracts, and other basic mechanisms for the support of research and teaching at colleges and universities are constantly changing to meet new national policy objectives. The character of drug free workplace assurances and lobbying disclosure requirements are just two very recent examples. We find that the process established by the Paperwork Reduction Act and the role that OIRA plays are becoming more, not less important to ensuring that implementation is reasonable.

Because OIRA acts as a check on practical utility and agency arbitrariness, we are concerned with the narrowing of access to OMB by limiting nongovernmental discussions to only the two top officials in OIRA. This restriction should be removed. Access to individuals is a different issue than the substance and degree of disclosure. We are especially troubled by that provision in legislation or in any side-bar administrative agreement governing review of regulations by OIRA.

COGR believes that the commitment to and action for paperwork reduction has not gone far enough since the Paperwork Reduction Act of 1980. The concerns that gave rise to the Commission on Federal Paperwork in the mid-1970's are still extant as colleges and universities can attest. We are most pleased to see continued emphasis on paperwork reduction as reflected in the House companion to S. 1742, H.R. 3695.

We know that the concerns of unnecessary paperwork and regulatory burdens have been of special interest to you. Your commitment to reduce the government's insatiable appetite for paperwork is indeed comforting. You have COGR's strongest support for your leadership in this effort.

Sincerely,

Milton Goldberg

Milton Goldberg

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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January 2, 1990

OFFICE OF
THE CHAIRMAN

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

In response to your letter of November 6, 1989, I am pleased to offer the views of the Office of the Chairman of the Administrative Conference on S. 1742, a bill to reauthorize the Office of Information and Regulatory Affairs within the Office of Management and Budget, to amend the Paperwork Reduction Act (Chapter 35 of Title 44, United States Code), and to establish a Commission on Federal Information.

Our comments address four main aspects of S. 1742 as well as one or two other provisions. The main topics are: (1) the creation of new responsibilities in agencies and the Office of Information and Regulatory Affairs (OIRA) for information dissemination; (2) procedures for review of agency collections of information; (3) public disclosure by agencies and the Office of Information and Regulatory Affairs with respect to activities under review; and (4) the establishment of a Commission on Federal Information.

It is clear from the title of S. 1742, the "Federal Information Resources Management Act of 1989," as well as its provisions, that the Committee is interested in the total process of federal information collection, processing, analysis, and dissemination and not just the reduction of the paperwork burden on society. This "holistic" approach is a sound one. Improved coordination and modernization of the government's information systems will lead to greater efficiency of government programs and greater public knowledge about, and more effective public participation in, governmental processes. I have no doubt, however, that a by-product of coordinated, effective information management processes will be a genuine reduction in the paperwork burden on society.

In preparing these comments, I have been struck by both the tremendous complexity of the relevant technological and policy issues and the importance to our society of the issues that S. 1742 addresses. Like all scientific innovation, the new information technology can be used for good or evil. On the one hand, it enables us to make more accurate and sophisticated decisions in ways that can benefit society. On the other hand, it raises the issue of whether the increased collection and processing of information could lead to improper and dangerous surveillance by government over individual lives and organizational activity. As Alan Westin perceptively observed in his report for the Association of the Bar of the City of

New York--

> [a]s we are forced more and more each day to leave documentary fingerprints and footprints behind us, and as they are increasingly put into storage systems capable of computer retrieval, government may acquire a power-through-data position that armies of government investigators could not create in past eras.[1]

Strong leadership, therefore, is required to move us in a direction that strengthens our democratic process. I, therefore, commend the Committee on Governmental Affairs for its leadership in this area.

I. New Responsibilities for Information Dissemination

Consistent with its title, the Paperwork Reduction Act of 1980 addressed mainly the need for improved coordination and management of federal information systems and reduction of the paperwork burden associated with government programs. It does not focus on the public use of information collected and maintained by the federal government.

S. 1742 would expand the purposes of the Act to include ensuring the "greatest possible public benefit from information collected, maintained, used, disseminated, and retained by the Federal government," and "improv[ing] the quality and use of Federal information to strengthen decisionmaking, accountability, and efficiency in Government and society," (proposed 44 U.S.C. § 3501 (1) and (4), respectively). To further these purposes, the bill requires agencies to establish and maintain information dissemination management systems that will "ensure that the public has timely, equitable, and equal access to the agency's public information products and services and that agency information dissemination programs disseminate agency public information products and services in an efficient, effective, and economical manner," (proposed § 3506(c)(10)(A)).

While the heads of federal agencies are to have the primary responsibility for management of federal information resources (proposed § 3504 (h)(3)(D)), the Administrator of OIRA is charged with developing guidance to agencies on their information dissemination functions (proposed § 3504 (h)(1)). The need for guidance on the dissemination of government information is especially acute in this day of rapidly-developing information technologies and, especially, the use of computers for the electronic storage and transmission of information.

OIRA is directed to require agencies to consider specific factors in carrying out their responsibilities.[2] This guidance should "strengthen public access to Government information, regardless of format, . . . including--(i) making public information products and services available on [a] timely, equitable and equal basis to all persons; and (ii) encouraging a diversity of public and private information products and services" (proposed § 3504 (h)(3)(B)).

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[1] A. Westin, PRIVACY AND FREEDOM 158 (The Association of the Bar of the City of New York 1976).

[2] The factors are:

(i) whether dissemination is required by law;

(ii) whether dissemination is necessary for the proper performance of agency functions;

(iii) whether disseminating public information would assist in public oversight of agency operations or would promote the general social or economic welfare of the United States;

(iv) if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service;

(v) dissemination methods that will maximise the utility of the information to the public; and

(vi) the economy and efficiency of Government operations.

Proposed § 3504 (h)(3)(E).

The Administrative Conference recently adopted a recommendation on this subject. Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*,[3] is a general guide to agencies when making decisions about acquiring or releasing information in electronic form. Among other things, Recommendation 88-10 addresses the following matters: agency responses to Freedom of Information Act requests for electronically stored information (Part A); factors agencies should consider in deciding to acquire information in electronic form (Part B); factors agencies should consider in releasing information in electronic form (Part C); defining the appropriate roles of the public and private sectors in providing information and related products in electronic form (Part D); calculating the costs and benefits of acquisition and dissemination in electronic form rather than other forms (Part E); problems related to private party control of public information (Part F); technology issues (Part G); experimenting with electronic participation in agency proceedings (Part H); and the role of the National Institute of Standards and Technology in this area (Part J). I enclose a copy for your consideration. It is based on a comprehensive survey of agency programs and practices by Henry H. Perritt, Jr., Professor of Law at Villanova University,[4] which I also enclose.

The approach taken in S. 1742 with respect to development of government-wide policy on electronic information is generally consistent with the Conference's recommendation. For example, the Conference concluded that "Congress should formulate the larger value judgments necessary for a government-wide policy,[5] but that Congress should defer to agency judgment in selecting methods to implement those congressional policies.[6] We believe such approach is sound.

II. Review of Agency Collections of Information

S. 1742 amends sections 3506 and 3507 of Title 44, United States Code to modify the current procedures for review by the Office of Information and Regulatory Affairs (OIRA) of agencies' proposed collections of information.

A major change that would be effected by the bill is the requirement that the head of each federal agency (or the agency's senior designated official) establish a process for the review of each collection of information before it is submitted to the Administrator of OIRA for review and approval (proposed section 3506(e)). The agency office assigned to conduct this review is to have "authority independent of agency program officers to approve, disapprove, and make needed improvements in any agency collection of information," (proposed section 3506(e)(3)).

The result of this agency review process is a "certification" to the Administrator of OIRA that the collection of information has been reviewed according to standards set forth in the bill.[7] The agency also must certify that it has taken steps to give notice to, and

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[3] ACUS Recommendation 88-10, Federal Agency Use of Computers in Acquiring and Releasing Information, 1 CFR § 305.88-10 (1989).

[4] Perritt, Electronic Acquisition and Release of Federal Agency Information, 1988 ACUS Recommendations and Reports 601.

[5] ACUS Recommendation 88-10, Part I, ¶ 2. These judgments should include the appropriate roles of public and private sectors in disseminating information electronically and who should pay for value-added products, including the level of government funding.

[6] ACUS Recommendation 88-10, Part I, ¶ 3.

[7] The agency must find that the collection of information and related instructions--

> (A) are necessary for the proper performance of the agency's functions and are not unduly burdensome;
>
> (B) are not duplicative of information otherwise reasonably accessible to the agency;
>
> (C) have practical utility;

consult with, interested agencies and members of the public to minimize the burden on respondents and to allocate resources for the effective and efficient management and use of the information that is to be collected (proposed 3506(f)(2)).

Agency self-certification appears designed to affect the process for OIRA review. However, self-certification is referenced in the bill only in connection with the procedures for renewal of collections of information. Therefore, clarification of the applicability of self-certification to new collections of information is desirable. We now comment on the specific procedures for review set forth in S. 1742; these review procedures depend, as now, upon whether the collection of information is in a rule for which notice and comment is required, or not.

A. Collections of Information in Rules. The procedure for review of new information collections imposed by agency rules is set forth in proposed section 3507(i) and is essentially the same as currently provided by section 3504(h) of Title 44. S. 1742, however, specifies the procedures governing renewal of an existing collection in a rule for which a OMB control number has been assigned. This situation was not covered in the Paperwork Reduction Act of 1980, and the Office of Management and Budget filled this gap administratively.

Under the new statutory procedures, the agency begins the renewal process before the control number expires by publishing a notice in the Federal Register seeking agency (including OIRA) and public comments on continuation of the collection activity (proposed § 3507(j)(1),(2)). The agency then reviews the comments, including OIRA's, and also conducts the administrative review required of all collections of information. The agency's decision to continue the collection unchanged or to modify it must be published in the Federal Register, with a discussion of the comments and the justification for the decision (proposed 3507(j)(3)). The Federal Register notice is simultaneously sent to OIRA with a request for a control number or, where the agency seeks to make a "substantive or material" change, for a full review.[8]

If the agency seeks to continue a collection unchanged, the prior agency "self-certification" limits OIRA's discretion to disapprove it. OIRA can only refuse to assign a control number if the agency's action, in light of the comments, is deemed to be "arbitrary and capricious" (proposed § 3507(j)(4)). In addition, OIRA's decision to refuse must be made within 30 days; OIRA must have filed comments in response to the agency's request for comments; and OIRA must publish its finding of arbitrariness in the Federal Register, together with a notice stating that it is conducting further review (proposed § 3507(j)(5)).

OIRA's Federal Register notice also must initiate another round of notice and comment on the collection activity. No minimum comment period is specified by S. 1742. However, OIRA is given 60 days to consider comments and "to determine whether [the agency collection] is necessary for the proper performance of the agency's functions, including whether it has practical utility" (proposed § 3507(j)(5)(ii)). If the Administrator agrees to continuation of the collection unchanged, the review process is completed. But if the Administrator either disapproves the request or asks the agency to make a "substantive or material" change, he is required to publish an explanation of his decision in the Federal Register and to instruct the agency to begin rulemaking to consider changing the information

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(D) are written using plain and unambiguous terminology and are understandable to those who are to respond; and

(E) explain the need and ultimate use of the information to be collected, and the importance of accurate and timely response.

Proposed § 3506(f)(1).

[8] It is noted that anytime an agency plans to modify a collection in a "substantive or material" way, its proposal must be submitted to OIRA for review. Presumably such a change is to be reviewed following the procedures for review of a new proposal in section 3507(i).

collection. A new rulemaking on the collection of information includes the process for approving new collections in proposed section 3507(i).

We are concerned about the efficiency--and ultimately the fairness to persons subject to collection of information requirements--of the overall scheme set forth in S. 1742 for renewal of collections in rules. As Appendix 1 attempts to show more clearly, the process would entail: (1) an initial agency notice-and-comment period and review; (2) a notice-and-comment opportunity initiated by OIRA; and (3) agency rulemaking, with an additional opportunity for public comment and review by OIRA of the agency's revised collection of information requirement.

Although the Administrative Conference has long championed use of notice and comment procedure,[9] there can be too much of a good thing. Three rounds of notice and comment, even if initiated by different agencies, is almost certain to protract the review process. Assuming that the existing information collection requirement would remain in effect until changed, those subject to it will continue to be burdened throughout the multiple-stage review process. And if the requirement were to lapse with the expiration of the control number, agency programs might be disrupted pending completion of the process.

It appears unlikely that OIRA, after making an "arbitrariness" finding, will, following an additional comment period, reverse itself under a less rigorous "necessary/lacking practical utility" standard.[10] Our suggestion, therefore, would be to revise the bill to delete the OIRA initiated notice-and-comment period required by section 3507(j)(5), and simply authorize OIRA to instruct the agency to begin the process for new collections under 3507(i) if it finds that the agency action was "arbitrary and capricious."

B. Collections of Information Not in Rules.

S. 1742 would amend the Act to mandate a 30-day period for submission of public comments to the agency and OIRA on information collection requests before OMB may approve or disapprove an agency's proposed collection (proposed § 3507 (a),(b)). It also requires the Administrator of OIRA to publish in the Federal Register an explanation of any disapproval or modification of a "substantive or material" nature to an agency's proposed collection of information (proposed § 3507(b)).

The procedure to be followed in renewing collections of information that are not in rules is shown in Appendix 2 and summarized here as follows--

> (1) the head of the agency (or senior official) at least 90 days prior to expiration, must publish a Federal Register notice, seeking public comment and notifying the public that the information collection request has been sent to OMB;
>
> (2) at least 60 days before the expiration date, the agency must complete its review, and certify pursuant to § 3506(a) and request a control number or request review if it plans to change the collection in a substantive or material way.
>
> (3) the Administrator is directed to approve the collection of information for another 3 years unless "the Administrator . . . upon notice in the Federal Register and to the agency stating the reasons therefor, request[s] an agency to submit a collection of information for review and possible approval or disapproval under this chapter" (proposed § 3507(d)(4)).

While this procedure is quite straightforward, one issue that may deserve further consideration is the difference in review (particularly the standard of review) of information collection requests that have been self-certified versus those that have not. That is, while the effect of agency certification is clear with respect to review of requirements embodied in agency rules (discussed above), it is less clear what effect self-certification has with respect to other types of submissions. The Conference has no position on this issue; we simply raise it for your consideration.

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[9] See, e.g., ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR § 305.69-8 (1989).

[10] This is the standard for OIRA's decision in proposed § 3507(j)(6).

III. Public Disclosure When Agency Activities Are Submitted for Review

S. 1742 establishes new requirements for disclosure of information and communications related to agency activities that are submitted for OIRA review. These requirements apply not only to review under the Paperwork Reduction Act but to review pursuant to other authority.

The Administrative Conference debated and took action on this subject at its December 1988 plenary session. Recommendation 88-9, *Presidential Review of Agency Rulemaking* (enclosed), sets forth procedures and standards the Conference concluded should be followed whether presidential review is governed by executive order or a general statute. S. 1742 parallels the recommendation in that it establishes disclosure measures for both agencies and OIRA.

A. Agency Responsibilities. S. 1742 amends the Paperwork Reduction Act to provide that in carrying out functions under the Act and any other functions involving review pursuant to other authority by OIRA of agency activities, "the head of each agency shall establish and maintain a public file for each agency activity under review by [OIRA]" (proposed 44 U.S.C. § 3506(d)).

The agency is to place in this public file the following--

(1) copies of all written materials regardless of format which the agency provides to or receives from OIRA;

(2) information about all submissions made by the agency to the OIRA, including (A) the date of the submission; (B) the nature of the agency activity; and (C) the name of the person at OIRA to whom the submission is made; and

(3) copies of all changes in the agency activity made as a result of recommendations by the OIRA.

In Recommendation 88-9, the Conference advised agencies to place in the public file the following:

(1) copies of agency submissions to OIRA, including draft or final rules; formal analyses (e.g., the regulatory analysis); and agency agendas, other summaries, or schedules of pending or planned rulemakings (Rec. 88-9, ¶ 4 (a),(b));

(2) copies of any official written policy guidance received from OIRA (Rec. 88-9, ¶ 5 (a));

(3) any communication containing factual information relating to the substance of the rulemaking that is not already in the public file (and if the communication is oral, a summary)(Rec. 88-9, ¶ 5 (b)); and

(4) any communication transmitting information or views of persons outside the government (or if oral, a summary), regardless of the content (Rec. 88-9, ¶ 5 (c)).

In adopting its recommendations, the Conference attempted to strike an appropriate balance between the sometimes conflicting goals of informing the public of the basis for regulatory action, on the one hand, and encouraging intragovernmental communications that seek to coordinate the government's regulatory policy, on the other. Achieving this balance is difficult, and especially so when considering which communications between OIRA and the agency during review of a rulemaking to make public.

S. 1742's approach is to require the agency to place all written materials which it receives from OIRA in the public file. The bill, however, does not require any oral communications to be summarized and placed in the file. The Conference took a somewhat different approach in Recommendation 88-9. The committee that developed the recommendation considered requiring all written communications between OIRA and agencies to be placed in a public file. However, it soon concluded that such a requirement would discourage informal, inter-agency written communications during review, thus causing even greater reliance than now on oral communication between OIRA staff and the agencies. For this reason, the committee--and ultimately the Conference--limited its recommendation to official written policy guidance from OIRA.

The Conference identified two types of communications from OIRA to agencies, however, that should always be disclosed to the public, even when they are made orally. These are factual information and views or information from persons outside government. The Conference's position on these types of communications is consistent with views contained in a 1980 recommendation on intragovernmental communications in rulemaking.[11] As discussed below, the Conference would require OIRA to identify communications from persons outside government, which the agency then should place in its file.

The tension between the goals of informing the public of the basis for regulatory action and encouraging intragovernmental coordination also exists with regard to the timing of placement of internal documents in the public file. S. 1742 is silent with regard to timing, thus suggesting that submissions and other information are to be placed in the public file as soon as they are generated or received by the agency. The Conference concluded, however, that the intragovernmental communications required to be disclosed should be placed in the public file in conjunction with the notice or publication of the actions to which they pertained. For example, the draft rule and supporting analyses would be made available when the notice of proposed rulemaking is published; pre-rulemaking agendas or schedules (such as submitted under Executive Order 12,498) would be placed in the file after publication of OMB's annual Regulatory Program; and the final agency rule and supporting analysis would be placed in the file when the final rule is published.

B. OIRA Responsibilities. S. 1742, in a new section 3518, specifies the contents of an OIRA-maintained public file for each *agency activity* under review and, separately, for each *agency rulemaking activity* under review. We first comment on S. 1742's requirements pertaining to OIRA rulemaking review files.

OIRA would be required to establish a public file for each agency rulemaking activity submitted for review, and the file must be maintained in OIRA's public reading room beginning with receipt of the first document related to an agency rulemaking activity submitted to OIRA for review (proposed section 3518 (b)(1)). OIRA must place in the file:

(1) copies of draft Federal Register notices;

(2) copies of proposed or final rules;

(3) all written material, regardless of format, that is exchanged between OIRA and the agency conducting the rulemaking;

(4) all written material, regardless of format, received from persons outside the federal government; and

(5) a list of all meetings attended by OIRA employees with persons outside the government related to the rulemaking.[12]

In addition, OIRA is required to keep, and update monthly, a list of all proposed or final rules which have been submitted for review, together with OIRA's estimate of the time required for review (proposed § 3518(b)(2)).

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[11] ACUS Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 CFR § 305.80-6 (1989).

[12] Proposed § 3518(b)(1)(A)-(E).

OIRA is further required to:

(1) send the agency copies of all written material that it receives from persons who are not government employees;

(2) advise agencies on the substance of all oral communications concerning any agency rulemaking activity under review involving persons who are not government employees; and

(3) invite agency heads to all scheduled meetings with persons who are not government employees concerning any rulemaking activity under review.[13]

The Conference's recommendation was to the same effect. Recommendation 88-9 begins by stating the general principle that "[t]he officer responsible for presidential review should not allow the process of review to serve as a conduit to the rulemaking agency for unrecorded communications from persons outside the government," (Rec. 88-9, ¶ 6). To guard against this, OIRA is advised to--

(1) identify for an agency any communication it makes to the agency that transmits the views or positions of persons outside government;

(2) promptly transmit outsider comments to the agency for inclusion in the public file of the rulemaking;

(3) maintain a list identifying the time and general topic of oral communications OIRA has with persons outside government pertaining to the rulemaking, and make the list available to the agency for inclusion in the public file of the rulemaking; and

(4) invite the agency to send a representative to any meetings between OIRA and persons outside the government which pertain to a rulemaking under review, and the agency representative should place a summary of the meeting in the public file of the rulemaking.

Thus, there is substantial agreement between the responsibilities recommended by the Administrative Conference for OIRA and those prescribed in S. 1742. The principal difference is that the Conference envisions a single public file maintained by the agency that conducts the rulemaking. Agencies, after all, typically maintain rulemaking dockets and there would be little increase in the type of burden placed upon an agency by such a requirement. OIRA, of course, does not routinely maintain public records so it would need to institute new procedues to do so. Moreover, the records management burden for rulemaking proceedings from throughout the government would rest with OIRA and place considerable pressure on its limited resources. (OIRA's records management burden would be reduced significantly, however, if submissions made following agency self-certification are exempt from the OIRA public file requirement.) It seems preferable to distribute that burden among the agencies responsible for individual rulemaking proceedings.

We wish to comment on two provisions in proposed section 3518 that restrict OIRA's conduct of review of agency rulemaking, but which do not relate to maintenance of a public file. One is a requirement that only the Administrator and Deputy Administrator of OIRA may communicate with persons who are not employed by the federal government on regulations submitted for review (proposed § 3518 (5)). While we understand that this reflects the current OIRA practice, we question whether it is wise to embed such a specific limitation in the statute. It may not be desirable or necessary to restrict future staff assignments or organizational arrangements for the performance of review.

The second provision imposes a statutory deadline for completion of review by OIRA. OIRA would be required to complete review of nonmajor rules within 30 days and review of major rules within 90 days, or earlier if required by a statute or court order (proposed § 3518(6)(A)). A 30-day extension is available where OIRA determines an extension to be "absolutely necessary," (proposed § 3518(6)(B)).

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[13] Proposed § 3518 (b)(4).

The Conference debated this issue, but decided to recommend only that "[t]he process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines," (Rec. 88-9, ¶ 3). Our position comports with an earlier recommendation which expressed a preference for agency-imposed deadlines rather than statutorily-imposed deadlines.[14]

The Administrative Conference has taken no position on public disclosure outside the rulemaking review context. As noted earlier, S. 1742 contains a requirement that OIRA maintain a public file for any "agency activity under review" (excluding by implication rulemaking activities). The procedural requirements are similar to those required for rulemaking.[15] While this public file requirement clearly applies to agency submissions of proposed collections of information, the breadth and burden of this requirement, in our view, depends upon the definition of the terms "agency activity" and "under review." We have no position on this matter.

IV. Establishment of a Commission on Federal Information

Title II of S. 1742 would establish a Commission on Federal Information to "study and investigate statutes, policies, rules, regulations, procedures, and practices of the Federal Government relating to information gathering, processing, analysis and dissemination" (sec. 203(a)).

This general charge is followed by six areas or topics that the Commission *must* consider as part of its study. These areas involve the value of federal information and statistical data to our society and world competitive position; our long-term needs for such information; gaps in existing information and data relative to our needs; other deficiences in such information and data (e.g., quality, timeliness and relevancy); priorities for the collection of such information and data; and organizational structures needed to coordinate the federal statistics system and to ensure improvements to the federal statistics and information systems, (sec. 203(a)(1)-(6)).

You have a unique opportunity in establishing a Commission to provide the basis for protecting democratic values in an age of technological innovation. It is in that light that we urge you to consider whether the present language of this section unduly narrows the scope of the Commission's final report. More specifically, we wonder if the six mandatory study topics will be construed to limit the general charge to the Commission or cause the Commission to give short shrift to other important areas needing research and coordination. For example, the critical issues of dissemination of information to the public and the appropriate protection of the privacy rights of individuals are encompassed in the general charge but in not the specific areas. And from the Conference's perspective, the failure to include agency procedures and practices in the enumerated areas is unfortunate. As our study of electronic acquisition and dissemination shows, agency processes could benefit from greater examination and guidance.[16]

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[14] See ACUS Recommendation 78-3, Time Limits on Agency Actions, 1 CFR § 305.78-3 (1989).

[15] OIRA is required to place in a public file--

(1) copies of all written materials regardless of format related to activity which are received or provided by OIRA from or to a person outside OMB;

(2) a list of all meetings with persons outside federal government relating to a review activity.

(3) ongoing information about any submission, including date of submission, name of agency, name and type of activity and type or review, name of OIRA person doing the review, and the decision and date of decision made by OIRA.

(4) copies of any changes made because of OIRA recommendations during the review, including the reasons and authority for such changes; and

(5) an explanation of any approval, denial or disapproval of an information collection submission.

Proposed § 3518(a).

Finally, I would also ask the committee to consider the addition of a representative of the Administrative Conference as a member of the Commission. As you are aware, the Conference was established by Congress as the Executive Branch's principal adviser for improvement in agency procedures, organization and practices. We have many years experience in studying administrative process issues of the type that will be reviewed by the Commission, including those involving the acquisition, management and dissemination of information. We have recently completed exhaustive examinations of OIRA's rulemaking review process and the ways in which computer technology affects paperwork burdens and the public's access to government information. Moreover, Congress has given us a special responsibility for the collection of statistics and the publication of reports useful for evaluating and improving administrative procedures. See 5 U.S.C. § 574(3). In the circumstances, I would respectfully urge that you add to section 204 of the bill "the Chairman of the Administrative Conference or his designee."

V. Other Comments

Section 101(c) of S. 1742 amends the Statistical Policy and Coordination Functions of OIRA Administrator to, among other things, direct the Administrator of OIRA to establish an interagency working group on statistical policy. The working group is to be headed by OIRA's chief statistician and to consist of "the heads of the agencies with major statistical programs," (proposed § 3504(d)(2)). We urge you to consider whether it is necessary for membership in this group to be limited to heads of agencies and, if so, whether it is desirable to further define "agencies" or to specify the agencies to be included.

To illustrate why we raise this issue, consider the status of the Bureau of Labor Statistics and the Census Bureau. Both have major statistical functions and are subagencies of departments. Might the statute be construed to require membership in the working group for the Secretaries of Labor and Commerce? But even if the statute is not interpreted so narrowly, it may be desirable to allow the heads of the Bureau of Labor Statistics and the Census Bureau to designate other agency officials to serve on the working group. So, unless there is a policy reason for limiting membership to heads of agencies, you might want to build in greater flexibility.

Our remaining comments relate to changes S. 1742 would make to 44 U.S.C. § 3517. Section 3517 currently provides that "[i]n development of information policies, plans, rules, regulations, procedures, and guidelines and in reviewing information collection requests, the Director shall provide interested agencies and persons early and meaningful opportunity to comment."

S. 1742 would retain the opportunity for public comment for the review of information collection requests (proposed section 3517(a)). However, it creates a new subsection (b), which provides for only OIRA consultation with interested persons and agencies in developing "policies, plans, rules, regulations, procedures, and guidelines."[17] In light of the strong level of public interest recently shown in OIRA's planned changes in OMB Circular A-130, Management of Federal Information Resources,[18] the Committee may want to reconsider the desirability of eliminating the public comment opportunity for development of such policies.

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[16] See Professor Perritt's report (enclosed).

[17] Proposed 3517(b) states"

> In developing information and statistical policies, plans, rules, regulations, procedures, and guidelines, the Administrator shall regularly consult with information providers, users, and other interested parties, including the advisory committees established under the authority granted in this section.

[18] See, e.g., Office of Management and Budget, Second Advance Notice of Further Policy Development on Dissemination of Information, 54 Fed. Reg. 25,554 (June 15, 1989).

Other proposed new provisions would require the Administrator to establish an Advisory Committee on Information Policy and an Advisory Committee on Statistical Policy, and authorize the Administrator to establish other advisory committees.[19] The membership requirements for these OIRA-established advisory committees are specified--and in our view, somewhat over-specified. We suggest that sufficient direction would be given to OIRA by including only the first and sixth of the membership requirements; that is, that such committees "(1) be broadly representative of the groups with an interest in the relevant policy area;" and "[2] comply with the provisions of the Federal Advisory Committee Act" (proposed § 3517(e)).

I hope these comments are helpful to you. The Administrative Conference considers this to be a subject of great importance. If we can be helpful in any futher way, feel free to let us know.

Sincerely,

Marshall J. Breger
Chairman

MJB:mb

Enclosures:

1. ACUS Recommendation 88-10, Federal Agency Use of Computers in Acquiring and Releasing Information
2. Perritt Report: Electronic Acquisition and Release of Federal Agency Information
3. Recommendation 88-9, Presidential Review of Agency Rulemaking

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[19] Proposed §3517(c),(d).

APPENDIX I

S.1742

RENEWAL OF A COLLECTION OF INFORMATION CONTAINED IN AN AGENCY RULE

Agency F. R. (and other) notice
to give agencies, OIRA & public an opportunity
to comment on continuation; agency conducts
review & self-certification (§3507(j))

↓

Agency submits request to OIRA and publishes
F.R. notice stating plans to continue or
modify requirements; notice of OIRA submission;
& discussion of comments (§3507(j)(3))

↓

OIRA shall assign a control number
unless--

Agency failed to follow
internal review and notice
procedures

Agency plans "substantive
or material" modification

Agency action (including
response to comments)
is found to be
"arbitrary and capricious."

OIRA must decide in
30 days; must have
filed comments; &
must publish finding in
F.R. (§3507(j)(4))

↓

If OIRA refuses to assign control number,
must publish a F.R. notice seeking additional
comment; after comment period ends, OIRA has
60 days to make determination (§3507(j)(5))

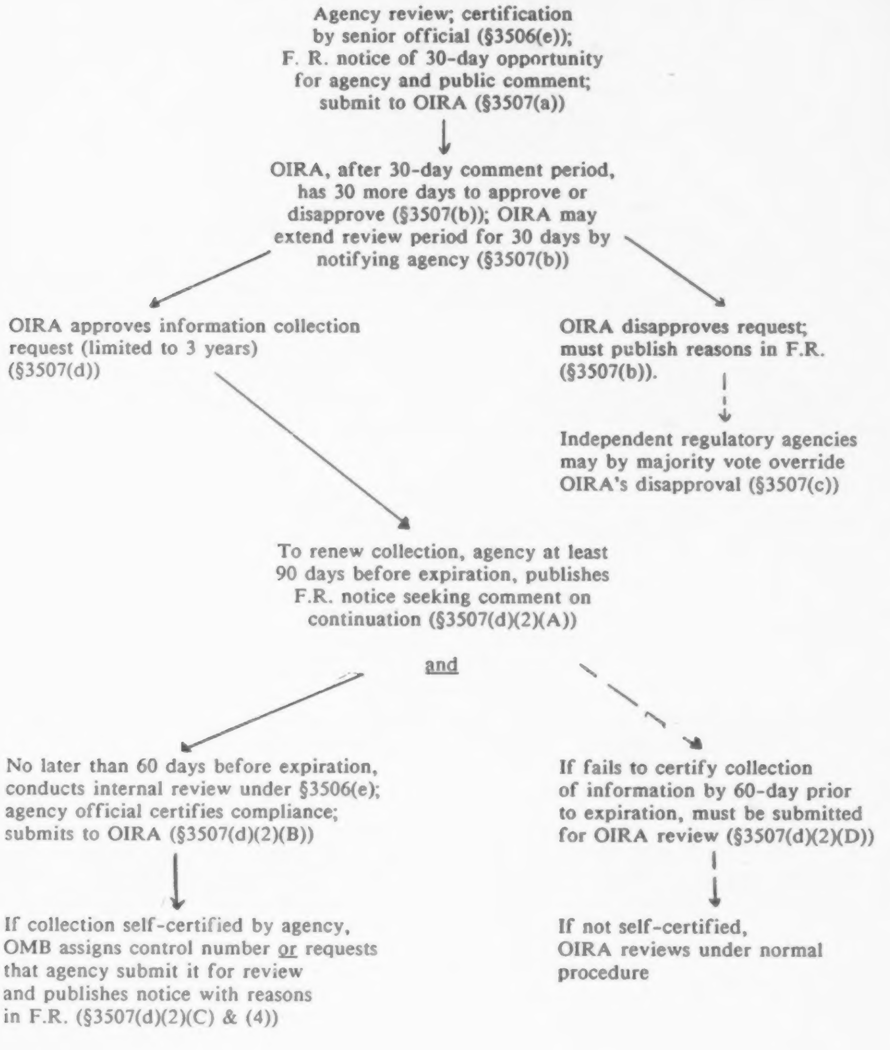
↓

If OIRA disapproves or instructs agency to
make "substantive or material" change, must
(1) publish explanation in F.R. and (2) order
agency to begin rulemaking to consider OIRA
proposed modifications or other changes
pursuant to procedures for new collection
of information (§3507(j)(6))

APPENDIX 2

S.1742

REVIEW OF PROPOSED COLLECTION OF INFORMATION (NOT CONTAINED IN AN AGENCY RULE)



Agency review; certification by senior official (§3506(e)); F. R. notice of 30-day opportunity for agency and public comment; submit to OIRA (§3507(a))

OIRA, after 30-day comment period, has 30 more days to approve or disapprove (§3507(b)); OIRA may extend review period for 30 days by notifying agency (§3507(b))

OIRA approves information collection request (limited to 3 years) (§3507(d))

OIRA disapproves request; must publish reasons in F.R. (§3507(b)).

Independent regulatory agencies may by majority vote override OIRA's disapproval (§3507(c))

To renew collection, agency at least 90 days before expiration, publishes F.R. notice seeking comment on continuation (§3507(d)(2)(A))

and

No later than 60 days before expiration, conducts internal review under §3506(e); agency official certifies compliance; submits to OIRA (§3507(d)(2)(B))

If collection self-certified by agency, OMB assigns control number or requests that agency submit it for review and publishes notice with reasons in F.R. (§3507(d)(2)(C) & (4))

If fails to certify collection of information by 60-day prior to expiration, must be submitted for OIRA review (§3507(d)(2)(D))

If not self-certified, OIRA reviews under normal procedure

Main Office
1200 McArthur Drive
Akron, Ohio 44320
216/745-1601

Satellite Offices
13221 Ravenna Road
Chardon, Ohio 44024
216/286-9461

2633 State Route 59
Orchard Plaza Suite A
Ravenna, Ohio 44266
216/296-4248

2200 Benden Drive
Suite 4
Wooster, Ohio 44691
216/264-1233

Visiting Nurse Service, Inc.
Making Life Better at Home

October 5, 1989

The Honorable John H. Glenn
United States Senator
Senate Office Building
Washington, DC 20510

Dear Senator Glenn:

We respectfully submit our comments and recommendations concerning the reauthorization of the Paperwork Reduction Act. We support the general thrust of the bill drafted by Senator Jeff Bingaman and trust that you will also support this proposed legislation.

Visiting Nurse Service, Inc. (VNS) is a home health agency providing over 100,000 visits annually. The increased paperwork demands on our organization are tremendous. The paperwork requirements have recently increased significantly because of the Medicare Program's Conditions of Participation.

While we support many provisions of the Conditions of Participation, we strongly oppose the extent of the paperwork requirements imposed by these Conditions. We are also submitting our comments to the Health Care Financing Administration to address our concerns with these provisions of the Medicare Program.

We believe that the bill drafted by Senator Jeff Bingaman provides substantial improvements to the Paperwork Reduction Act. Specifically, we feel that the proposed bill addresses three major problem areas as follows:

1. Allows for greater public participation opportunities in the paperwork review process and requires greater accountability by the Office of Management and Budget (OMB).

2. Establishes procedural safeguards and more specific criteria for Executive Branch regulatory review. For example, OMB should be required to document all written and oral communications, with those inside and outside of government, about a rulemaking under review as part of the public record. Also, delays must stop.

3. Affirms the responsibility of agencies to disseminate information, including electronic information, and prescribing the limits of OMB's authority in this area. Without legislation, OMB is free to dictate national information policy.

We appreciate the opportunity to present these comments for your consideration. We trust that you will support this proposed legislation which would implement various measures and safeguards to preclude abuses which have occurred in the past.

Very truly yours,

Jerry A Bauman

Jerry A. Bauman
Senior Vice President

JAB/dp

United States
National Commission on
Libraries and Information Science

November 2,1989

The Honorable John Glenn
SH-503 Hart Senate Office Building
Washington, D.C. 20510-3501

Dear Senator Glenn:

The U.S. National Commission on Libraries and Information Science is an independent agency within the executive branch, created in 1970 through PL 91-345, and charged with advising the President and Congress on national library and information science policy issues. As part of that function we provide input on legislation relating to national information policy. The "Federal Information Resources Management Act of 1989" (S.B. 1742), introduced by Senators Jeff Bingaman and Joseph Lieberman and now before the Subcommittee on Government Information and Regulation, has come to our attention and we offer the enclosed comments concerning this bill to assist you and your Committee as you deliberate.

The Commission has concerns in the following areas: electronic dissemination, the Federal Information Locator System, public/private sector responsibilities, agency coordination, an appeals process within OMB for disapproved information collection requests, and the formation of a Federal Information Commission and advisory committees. We concur that it is appropriate to change the emphasis, and title, of the Paperwork Reduction Act to one which is more in tune with the related and larger issues of information management and dissemination.

We hope that you will find these comments useful as you review them. We think that S.B. 1742 has much to offer in the area of information resources management, and will be glad to meet with you or your staff to discuss these comments.

Sincerely,

Susan K. Martin

Dr. Susan K. Martin
Executive Director

1111 18th Street, N.W., Suite 310
Washington, D.C. 20036
(202) 254-3100

United States
National Commission on
Libraries and Information Science

U.S. NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

COMMENTS

S.B. 1742

Federal Information Resources Management Act of 1989

25 October 1989

Contact: James R. Benn

1111 18th Street, N.W., Suite 310
Washington, D.C. 20036
(202) 254-3100

ELECTRONIC DISSEMINATION

Although there are several references to dissemination of information in non-print format prominently cited in S.B. 1742, the intent in regard to electronic dissemination through the Federal Depository Library Program is not clear. On page 7, Section 102 (6), the term "information resources" is defined as including data and information in any format. On page 17, Section 104 (e), OIRA is made responsible for strengthening public access to government information, regardless of format.

The Federal Depository Library Program is mentioned on page 24, in Section 106 (3) (F) under "Federal Agency Responsibilities". Agencies are to "provide to the Superintendent of Documents for distribution to the Federal Library Depository Program all publications required by chapter 19 of this title...". The clarity in the previous statements should be carried through to apply to the electronic dissemination of information to Federal Depository Libraries.

The following statement should be added under Section 104 (e) "Information Dissemination Functions of the Administrator" (a new paragraph F should be added at the end of Section 104 (e), page 19): "(F) require agencies to make available to the Superintendent of Documents all public information products required by law to be made available to Federal Depository Libraries, including information products and services in electronic formats, with necessary software to access such information in electronic format."

Given the proliferation of CD-ROM and other electronic publishing, the GPO's Depository Library Program may not be able to provide significant portions of government information to citizens if the dissemination of information in electronic format is not clearly included in the appropriate law.

FEDERAL INFORMATION LOCATOR SYSTEM

We note that the final version of this bill limits FILS to an inventory of information collection requests made by agencies to OMB, and that OMB is directed to designate one or more agencies to operate FILS. While this application will be useful, it is also important to develop the concept of an inventory and register of all information products and services disseminated by the federal government. We concur with the call for a study of this issue by OIRA, in conjunction with the Advisory Committee on Information Policy, in Section 109 on page 40. NCLIS and the Library of Congress could both provide advice in this area.

To the extent that the Government Printing Office has a structure in place to facilitate the creation of FILS, we strongly recommend that the delegation of responsibility to GPO for this function be explored.

As the legislation is currently written, there is no date set for the completion of this study. We recommend that language be included to require it be submitted no later than one year after the enactment of this bill.

PRIVATE/PUBLIC SECTOR

On page 18, Section 104 (e) (3), there are six qualifiers which agencies will be required, by OIRA, to consider in relation to public information dissemination functions. One of these requires an agency to consider "(iv) if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service".

The intent of this section is unclear. How is equivalency to be defined? Who will determine if another product reasonably achieves agency objectives? The are many problems with relying upon outside sources, private or public, to fulfil an agency's dissemination objectives. The product may be similar, but may not receive wide enough distribution or remain available for the required period of time. These are critical issues in terms of the requirements within this same section (page 17) for agencies to make "public information products and services available on timely, equitable and equal basis to all persons". If the requirement cited in the previous paragraph results in some government information being made available only through the private sector, some of these information products may not be available on an equitable and equal basis to all persons, due to availability and pricing structures.

It is also not clear what criteria will be applied to the six qualifiers. Will an agency simply have to show it considered all six, or will it be required to meet some stipulated level of compliance for all six? There is considerable difference between these two extremes, with significant implications for the dissemination of federal government information. This section should be further considered and developed to clarify its intent.

AGENCY COORDINATION

We support the statement in Section 104 (a) on page 11 that the Administrator of OIRA "shall insure that the development of information policies, when appropriate, shall be coordinated with agencies with shared information management responsibilities...". The development of government information policies does need to take into account the wide range of information dissemination activities taking place among federal agencies.

The above intent, however, is not carried over into Section 104 (e) on page 17, where it is stated that guidance in relation to information dissemination be developed by the Administrator "in consultation with central information management agencies possessing governmentwide dissemination authority under law...". This paragraph should be amended to read that the Administrator of OIRA shall "ensure that the development of information policy, when appropriate, shall be coordinated with all agencies, including central information management agencies and those agencies represented by the Small Agencies Council, with shared responsibilities under this chapter and other provisions of the law".

APPEALS PROCESS

The bill could be strengthened by the inclusion of an appeals process for information collection requests which have been disapproved by OIRA. We recommend that Section 108 (b) of the July 20, 1989 discussion draft of the Conyers PRA reauthorization bill be reviewed as a model for an appeals process.

FEDERAL INFORMATION COMMISSION
ADVISORY COMMITTEE ON INFORMATION POLICY

If a Federal Information Commission is established as described in Title II of this bill, we recommend that it include a representative from the U.S. National Commission on Libraries and Information Science, because NCLIS is the permanent agency charged under PL 91-345 to advise the President and Congress on these policies.

Section 111 calls for the establishment by the Administrator of OIRA of an Advisory Committee on Information Policy. This is an excellent concept. Given the current work of NCLIS in the area of national information policy, we recommend that NCLIS be designated as the Advisory Committee on Information Policy.

TITLE CHANGE

S.B. 1742 provides a change in title from the Paperwork Reduction Act to the "Federal Information Resources Management Act of 1989".

This title change is useful in that it provides a more useful context in which to view the contents of the bill. Many of the information dissemination issues associated with the Paperwork Reduction Act go beyond the reduction of paperwork burdens and more properly belong in the arena of management of information resources.

National Archives

Washington, DC 20408

NOV 27 1989

Mr. Jack Sparks
Committee on Governmental Affairs
SD-340
United States Senate
Washington, D.C. 20510

Dear Mr. Sparks:

I am pleased to respond to Senator Glenn's request for comments on S.1742, which proposes to reauthorize the Office of Information and Regulatory Affairs, amend various provisions of Title 44, Chapter 35 (The Paperwork Reduction Act), and establish a Commission on Federal Information.

In general, the National Archives and Records Administration (NARA) supports S.1742, particularly Title III, Section 301, on the management of public records. Section 301(a) would clarify the responsibilities of the Archivist and of agencies in certain areas. Specifically, it calls upon the Archivist to issue binding regulations establishing standards for interpreting and applying the definition of records and for creating and maintaining adequate documentation of agency programs, policies, and procedures. Under this provision, the National Archives would offer guidance to agencies for their use in arriving at records creation and disposition decisions.

Section 301(b) clarifies that agency heads must comply with the regulations of the Archivist, including the regulations issued under the provisions of 44 USC 3301 through 14. Under current statute and interpretations, agency heads must consult the Archivist's regulations and cooperate with the Archivist in applying the Archivist's guidance to agency records management programs, but agency heads are not bound by such regulations and guidance.

Finally, Section 301(c) clarifies the Archivist's authority to inspect records as defined in 44 USC 3301 in order to determine their historical value. This clarification will also assist the National Archives in the review of agency records management programs for the purpose of determining compliance with NARA guidelines, regulations and standards. Only through inspection can NARA fully ensure that archival records are being properly identified and scheduled for transfer to the National Archives for long-term preservation.

My reservations regarding S.1742 are minor in comparison to the highly important and favorable provisions of Section 301. However, I would like to point out concerns in two areas.

Title I, Section 108, leaves to OIRA the determination of what agencies will operate the Federal Information Locator System. Should OIRA determine that the National Archives is the proper agency to operate the system, I would be concerned that this activity would draw upon resources needed for programs more central to NARA's mission. Undoubtedly, because FILS is a potential resource about agency information and records holdings in the Federal Government, system designers should consult with the National Archives regarding the structure, fields, portability, and potential other beneficial uses of systems under FILS. Nevertheless, in view of the largely tangential nature of FILS and its distant relationship to the central NARA mission, and within current resource allocations, the National Archives does not desire to participate in the operation of FILS in any way other than occasional consultation.

Title II, Section 204, calls for the creation of a Commission on Federal Information. The National Archives is not designated as a member of the Commission. Clearly, among Federal agencies, only NARA is charged with the preservation of Federal information over an extended period of time. It is unlikely that other members of the Commission will bring to discussions the same perspectives and concerns for accessibility of information over time as NARA would bring. Only through membership, I believe, can NARA assure proper consideration of archival issues with regard to Federal information policies and practices.

Thank you for the opportunity to comment on S.1742. If you have any further questions, I will be happy to respond.

Sincerely,

Claudine Weiher

CLAUDINE J. WEIHER
Acting Archivist
of the United States

ADVISORY
COMMISSION ON INTERGOVERNMENTAL RELATIONS
WASHINGTON DC 20575

November 20, 1989

Mr. Jack Sparks
Committee on Governmental Affairs
U.S. Senate, SD-340
Washington, DC 20510

Dear Mr. Sparks:

I am responding to Senator John Glenn's request for comment on S. 1742, a bill to further the goals of the Paperwork Reduction Act and to establish a Commission on Information.

The Advisory Commission on Intergovernmental Relations (ACIR) has not had an opportunity to review and express a formal position on this proposed legislation. I respond, therefore, in my capacity as Chairman of the Commission.

Overall, the purposes of the bill are laudable. Given that the ACIR works closely with state and local officials, I know that state and local governments would welcome all reductions in reporting paperwork consistent with the federal government's legitimate needs for information. In the field of grants alone, the federal government disburses about $130 billion through almost 500 programs administered by about 28 agencies.

This legislation, however, addresses only one of the two major sources of federally required paperwork for state and local governments. That is, the bill seeks to reduce the amount of paperwork generated by existing federal grant-in-aid programs, regulations, and the like. Here the bill may be successful in achieving paperwork reductions; however, the total paperwork burden for state and local governments is likely to continue to increase, despite the legislation, because new federal programs and regulations enacted by the Congress and promulgated by the executive branch will each be accompanied by paperwork requirements. Although the legislation will, of course, apply to all new programs, nevertheless, every new program brings new paperwork. This points to the need for Congress to consider paperwork requirements when enacting legislation.

Although I sympathize with the desire to set specific targets for paperwork reduction (i.e., 5% in FY 1990 and 5% in FY 1991), such targets do not seem workable, in part because every new law or executive regulation carrying paperwork requirements will add to the overall paperwork burden. To meet the above goals, existing paperwork requirements will have to be reduced by more than 5% each year. Also, these reduction targets appear to conflict with calls in other parts of the legislation for more data and more relevant information on changing conditions in American society.

Regarding the Commission on Federal Information, I would encourage you to increase the number of state and local official members to at least four in order to provide representation from a high population state and a low population state and from a large urban local government and a small rural local government. Furthermore, where information is required by law, this Commission should focus not only on what is really needed but also on situations where state and local officials receive multiple requests for the same information on different forms from different federal agencies.

I also would express a word of caution about allowing a temporary commission to select its own chairman and vice chairman. If there is disagreement or deadlock on the commission, work can be delayed for a considerable period of time.

Consideration should be given in this legislation to the needs of small federal agencies for whom this legislation imposes its own set of administrative and paperwork burdens. Many small agencies deal with specific sectors of the public and are able to develop cooperative relationships that facilitate information collection and sharing. Centralized decisions with respect to small-agency information needs may not be in the best interests of those agencies or the public.

In addition, a distinction might be made between information that is required by law and information that is requested on a voluntary basis. The latter type of information collection does not impose a burden so long as the prospective respondent is free to decline the request, and with no penalty for doing so. Regulating voluntary information may be counterproductive and may actually reduce the amount of information that would otherwise be forthcoming. Voluntary information collection is self-regulating to the extent that an agency that makes too many requests or too many frivolous requests will find that its constituents will not respond to requests.

Finally, I would like to reinforce the objective of Title II, Sec. 203(a)(1). In certain areas, there is a need for more information. From the perspective of our Commission, for example, it would be very useful to have more fiscal, social, and economic data, and more frequently reported data, about local governments, and especially small local governments. In turn, it would be very useful to have more information than is now reported in aggregate terms disaggregated for states and for local governments. I would also like to applaud the provisions for decentralization and expediting of data collection requests (Section 107), public disclosure provisions (Sections 107 and 112), and the establishment of a locator system (Section 108).

I hope these comments are useful. Generally, I believe that S. 1742 is another step in the right direction.

Sincerely,

Robert B Hawkins, Jr.

Robert B. Hawkins, Jr.
Chairman

SENT BY FAX
FROM:
NATURAL RESOURCES DEFENSE COUNCIL
1350 NEW YORK AVENUE N.W.
WASHINGTON, D.C. 20005

ORIGINAL TO FOLLOW BY MAIL

February 20, 1990

Senator Jeff Bingaman
Chairman, Subcommittee on Government Information
and Regulation
Committee on Governmental Affairs
SH-524 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Bingaman:

The Natural Resources Defense Council considers it important as the Governmental Affairs Committee begins hearings and further debate on S. 1742, the Federal Information Resources Management Act of 1989, that recent activities of the Office of Management and Budget pertaining to risk assessment be thoroughly scrutinized. As you know, risk assessment forms the underpinning of a great many of this country's environmental regulations. NRDC has recently learned that OMB co-sponsored a conference in June of 1989 on risk assessment and risk management. The conference was apparently attended by representatives of many countries of the Organisation for Economic Co-operation and Development (OECD). Oddly, EPA and some of the other agencies who routinely conduct risk assessments had no representative at this meeting, which also was closed to the public.

At the conference Dr. Richard Belzer, an economist employed by OMB, presented a paper entitled, "Current Regulatory Issues in Risk Assessment and Risk Management." This paper is replete with statements about both science and policy which the NRDC strongly contests. Many of these statement are also diametrically opposed to the policies and regulatory activities of the agencies which are entrusted to protect health and safety, such as EPA. Even more disturbing is the fact that an OMB economist, by positing positions on the technically complex issues of risk assessment, is likely to lead to confusion within the international community about U.S. government policy on assessing and managing risk.

The first page of the printed version of Dr. Belzer's paper contains a caveat, "The views expressed in this paper are the authors' [sic] and do not necessarily reflect those of the Office of Management and Budget." However, the entire document is typeset with a heading on every even-numbered page which reads, "Regulatory Program of the United States Government." This curious heading would certainly lead some readers to surmise that the opinions expressed are part of the U.S. government's regulatory program. The 1990 Regulatory Program of the U.S Government has never been made public, despite an executive order requirement to publish the regulatory program annually.

As observers of OMB's involvement in environmental regulation, NRDC cannot help but wonder if Dr. Belzer's paper was, indeed, a portion of the unpublished 1990 U.S. Regulatory Program. If so, why was the Regulatory Program never published? Clearly, any modification of risk assessment policy is of enormous concern to all who care about public health and safety. A public debate of any such risk assessment proposal is imperative. But if Dr. Belzer's paper was not a portion of the regulatory program, why was Dr. Belzer's paper circulated with its misleading heading? Was there any significance to the fact that this paper was presented at the same time that congressional hearings were held on OMB's activities and possible amendments to the Paperwork Reduction Act? Was OMB perhaps reluctant to publish the Regulatory Program, particularly if it contained a controversial section on risk assessment and management, while Congress was weighing amendments to the Act? NRDC believes that the answers to these questions are essential to evaluating OMB's involvement with the regulatory agencies and the need for legislation to further guide the OMB's activities.

Aside from concerns about OMB's involvement in technical, scientific issues for which the OMB lacks expertise, there are important substantive issues raised by Dr. Belzer's paper. Dr. Belzer states, "Careful risk assessment incorporates both types of analysis [animal bioassay and epidemiology] to ensure that the emerging picture of human health risk is as complete as possible, and that inferences derived from this picture are themselves internally consistent." From NRDC's perspective, this is one of the most objectionable comments in Dr. Belzer's risk assessment paper, but the point is probably rather obscure to those not familiar with the arguments about risk assessment. What Dr. Belzer is suggesting is that risk assessment cannot be considered "careful" or "complete" unless it incorporates data on human health effects ["epidemiology"].

It appears that at least one OMB official is maintaining that he would not consider risk assessment to be adequately performed without the inclusion of human health data--which means that government regulation of dangerous substances would have to await a human "body count". Fortunately, this has never been the regulatory position of agencies such as EPA or FDA in regulating the myriad of hazardous substances in our environment. Because animal testing does enable sound predictions about the consequences of exposure for human health, many substances are regulated on the basis of animal testing. NRDC and other environmental/public health groups would consider it the height of folly to subject human beings to unregulated levels of substances known to cause illnesses and injuries in other mammals simply because the government may not have a perfect or "complete" picture of the number of people who will be disabled or killed by the toxic substances. If this statement by Dr. Belzer is OMB's position, NRDC would expect the OMB to be hostile toward many of the environmental laws and regulations now on the books.[1] Environmental laws and regulations often mandate agency action to protect human health and prevent high risks, not simply to reduce risks after they have been proven to result in a disastrous human health toll. Averting catastrophic health impacts normally requires action before human exposures occur. Dr. Belzer's statement the importance of human health data in risk assessment and his impassioned critique of animal testing seem greatly at odds with the government's mission to avoid--and not just to mitigate--public health crises.

Dr. Belzer's paper reveals a misunderstanding of several instances of risk assessment and risk management performed by the agencies. Dr. Belzer describes the Alar controversy in a way which makes it virtually unrecognizable to me, one of the principal participants in the debate over the growth regulator used on apples. He claims, erroneously, that the

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[1] For example, the Federal Food, Drug and Cosmetic Act prohibits the use of any food additive (including a pesticide) if it is shown to cause cancer in man or laboratory animal. This explicit, congressionally-mandated "anti-cancer" provision is called the Delaney clause, and occurs at section 409 of the FFDCA. Many regulations require an agency to act based on the results of appropriate animal testing. An example of such a regulation is found at 40 C.F.R. section 154.7. That regulation, which is designed to implement the federal pesticide law, FIFRA, requires EPA to initiate a review to consider the need to further regulate or cancel a pesticide if animal testing meeting EPA's protocols indicates a potential for health problems.

EPA decision to regulate Alar (daminozide) as a probable human carcinogen "was based on a single positive animal bioassay." In fact, the Agency evaluated at least four positive cancer studies before concluding that Alar and its breakdown product posed a human cancer threat.

Dr. Belzer continues:

> "[B]efore it was banned, ethylene dibromide (EDB) was used as a grain and soil fumigant to combat vermin and molds. Vermin transmit disease, and molds harbor the natural and potent carcinogen aflatoxin B. It is reasonable to assume that banning EDB probably increased these human health risks."

Dr. Belzer's discussion of EDB is fundamentally confused. EDB, a chemical which was primarily used as an insecticide and nematicide, was not legal to use to combat molds such as aflatoxin. There is no evidence that EDB had any effect whatsoever on the level of aflatoxin in food. Dr. Belzer's surmise that a ban of EDB increased health risks is novel and without basis.

Dr. Belzer's paper is also riddled with broad, misleading generalizations about how risk assessment and risk regulation have been practiced. Dr. Belzer states, "[E]stimates [of risk] often are based on the upper-bound lifetime cancer risk to the maximum-exposed individual (MEI), the hypothetical person whose exposure is greater than all others." This statement is simply not true in the regulation of pesticides, whether the regulation is designed to protect farmworkers from occupational exposure or to protect consumers from pesticide residues in food. Instead, at many points in the pesticide risk assessment process EPA uses assumptions which calculate the risk for the "average" consumer or worker, often greatly understating the risks to many individuals and some groups of the population who are more exposed to the pesticide under scrutiny.

In conclusion, I commend you for your efforts to enhance the Paperwork Reduction Act in ways which would provide the public with greater information about the interactions between the regulatory agencies and the Office of Management and Budget. Environmental protection depends upon the ability of agencies to act swiftly and in accordance with their statutory mandates to develop and enforce regulations. A great many of those regulations are fundamentally dependent on risk assessment being performed in order to avert human risk. I urge you to investigate whether the paper presented last summer by OMB's Dr. Belzer is in fact a reflection of a new government risk assessment policy, and, if so, why OMB is involved in establishing a government-wide scientific policy. Please let me know if I can be of any help to you or your staff.

Sincerely,

Janet S. Hathaway
Senior Project Attorney

SYRACUSE
UNIVERSITY
1 8 7 0

School of Information Studies

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November 7, 1989

Mr. Leonard Weiss, Staff Director
Senate Government Affairs Committee
United States Senate
Washington, D.C. 20510

Dear Mr.Weiss:

I recently spoke with Ed Jayne, Staff Director for the Senate Subcommittee on Government Information and Regulation regarding S. 1742, "The Information Resources Management Act of 1989." He indicated that it was possible that hearings might be held on this bill in the near future. I am most interested in this bill and hope that it will be supported by the Government Affairs Committee.

As a professor teaching and conducting policy research in the areas of Federal information policies and information resources management, I believe that the reauthorization is an excellent opportunity to significantly improve Federal IRM. Further, the bill can also serve as a vehicle to better coordinate information policy making and (hopefully) improve the dissemination or and access to government information.

In a number of recent publications (see attached material) we have outlined suggestions and strategies for improving IRM. Some areas especially important are:

- Definition of IRM: it is essential that the reauthorization define IRM to include a public service component and to recognize that IRM is also intended to assist the public access government information; IRM cannot continue to be seen largely in terms of information technology management and procurement.

- IRM job classifications: to date, the Office of Personnel Management has yet to define a series of job classifications for IRM in the federal government. Thus, the title means all things to all people. The reauthorization should include language requiring OPM to develop a set of IRM job classifications within a specific period of time.

4-206 Center for Science and Technology / Syracuse, New York 13244-4100
315-443-2911

- IRM educational requirements: Ongoing programs for educating existing Federal IRM managers and requiring those who currently call themselves IRM managers are desperately needed. The School of Information Studies, here at Syracuse University offers a masters degree in IRM--to my knowledge, it is the only such program in the country. Generally, existing Federal IRM managers are primarily ADP trained, and not trained in IRM.

- Coordination of information disseminators. The decentralized approach by which government information is disseminated requires much better coordination. Many agencies are unfamiliar with existing policies and guidelines regarding dissemination, and a number of executive branch agencies have effectively circumvented statutory requirements as outlined in Title 44, USC.

These, of course, are only some of the issues. Nonetheless, S 1742 offers significant opportunities to strengthen both IRM and the dissemination of government information.

I have met with Steve Katz and Liz Powell, on the Senate Subcommittee on Government Information and Regulation and discussed these and other concerns regarding the re-authorization bill. I have also testified before the House, Committee on Space Science and Technology regarding related aspects of IRM in an STI context (see attached).

Overall, the proposed legislation, S. 1742 is good, and is a significant improvement over the existing legislative basis for Federal IRM, information policy, and information dissemination. However, in addition to the areas I outlined above, there are other areas in which the legislation could be improved.

I would be pleased to discuss in greater detail with you issues and strategies for strengthening Federal IRM, improving the access to and dissemination of government information, and better coordinating Federal information policy development. Please let me know if I can be of assistance to you and the Committee.

Sincerely,

Charles R. McClure
Professor

enc:

NATIONAL
GOVERNORS'
ASSOCIATION

Terry E. Branstad
Governor of Iowa
Chairman

Booth Gardner
Governor of Washington
Vice Chairman

Raymond C. Scheppach
Executive Director

Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1572
Telephone (202) 624-5300

February 20, 1990

The Honorable John Glenn, Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Governors' Association was an original and strong supporter of the Paperwork Reduction Act. We testified at the Senate subcommittee hearing on the need to reauthorize and strengthen the act. S. 1742, as now drafted, would fundamentally change the purpose and thrust of the act from paperwork reduction to information collection, management, and dissemination. While these activities may be necessary, they will increase, not reduce, federal paperwork and information processing burdens. In terms of paperwork reduction, S. 1742 mentions the word only eight times, five times in the first four pages and thereafter essentially forgotten.

State and local governments need every possible avenue to reduce unnecessary and duplicative federal paperwork requirements and we need the flexibility to bring together diverse federal resources for the benefit of the same client. There is now a critical need for all federal human resource programs to be compatible and manageable by means of consistent and fair regulations. The Federal Paperwork Reduction Act is one essential tool in meeting this need. For example, it was used to bring about more manageable regulations for the recently enacted welfare reform legislation.

S. 1742 would reduce, not strengthen, paperwork reduction efforts. Cost-benefit analysis requirements have been eliminated and paperwork reduction has been downgraded to one of eight "information management" activities. Agencies are left to do their own "self-certifications," except where they are "arbitrary and capricious" — a standard difficult to apply to any situation, much less public servants.

The changes proposed in the standards for reviewing federal paperwork would strangle meaningful review efforts by state and local governments and OMB's responsibilities to seek efficient government at the lowest cost to the taxpayer. The changes establish two categories of review whereby the very regulations and rules that most affect state and local governments are placed in the "arbitrary and capricious" category, rather than the current standard of "necessary and practical utility." The "necessary and practical utility" standard should be the bottom line for all federal rules and regulations and must not be weakened or made meaningless.

There is very little in the 65 pages of S. 1742 that would give state officials a means to challenge excessive agency regulations. The committee may find a need for information resources management, but state governments also need the committee's strong support for effective paperwork reduction.

The Paperwork Reduction Act should be reauthorized in title as well as substance, and paperwork reduction should be the primary purpose of the act. The act would be greatly strengthened if language was added to require that agencies utilize state and local laws and practices to carry out federal program purposes without requiring duplicate federal procedures. We recommend that the act require the use of existing sources of information or "generic" information and census data, rather than requesting duplicate information from the same client or government. The act could require agencies to publish an annual report on the cumulative, as well as incremental, cost impact of their regulations over the past year. The act also should require agencies to give a written response to the comments of organizations representing state and local elected officials.

The National Governors' Association, and several other national associations of state and local officials, have worked closely with Rep. Frank Horton on the House version of this legislation. We are willing to work with the Senate to renew and strengthen the Paperwork Reduction Act. However, S. 1742, as now written, cannot be supported by the National Governors' Association. With your permission Mr. Chairman, I would like for this letter to be a part of the hearing record.

Sincerely,

Terry E Branstad

Governor Terry E. Branstad

cc: Members of the Committee
Leonard Weiss
JoAnne Barnhart

JOHN GLENN, OHIO, CHAIRMAN

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LEONARD WEISS, STAFF DIRECTOR
JO ANNE BARNHART, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

March 12, 1990

Governor Terry E. Branstad
Chairman
National Governors' Association
444 N. Capitol Street
Washington DC 20001-1572

Dear Governor Branstad:

As the sponsor of S. 1742, "The Federal Information Resources Management Act of 1989", I wish to respond to your February 20, 1990 letter to Senator Glenn about the bill.

I share your concerns over the continuing need to work towards the reduction of duplicative and unnecessary Federal information collection activity. If government at all levels is to work efficiently it cannot be encumbered with unnecessary paperwork burdens. No one supports this goal more than I do.

In May and June of 1989, I chaired several days of Subcommittee hearings on the subject of the quality of Federal information, and on the overall subject of the reauthorization of the Paperwork Reducation Act. I was pleased to receive the testimony of the National Governors Association at those hearings. I came away from those hearings with three distinct concerns. First, I am concerned that the paperwork review process is not as effective as it could be and that the paperwork burden continues to grow. Second, I am concerned with the apparent absence of any overall government information strategy or policy, and am convinced of the need for an information policy for the federal government which recognizes a comprehensive life-cycle management of information. And, third, I am concerned that the regulatory review process is an all-consuming one for the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and is characterized by unnecessary delays and a lack of public accountability.

In drafting S. 1742, my Subcommittee staff worked closely with a wide variety of individuals and organizations to ensure that the legislation was building upon the principles and framework of the current law. The existing law requires the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) to coordinate Federal information policy in areas including: information collection, information resources management, information dissemination, privacy, statistics, and more. However, many sources, ranging from congressional hearing reports to General Accounting Office investigations have demonstrated that effective management by OMB and the agencies requires greater clarity in the law.

I know you can appreciate the paradoxes presented by the singular issue of reducing paperwork volume and burden. For some, this popular mandate translates into a law which has as its singular goal the elimination of Federal information. I believe that such a view undermines the ability, and often the obligation, to collect information valuable to decision-makers at all levels of government from Senators, to Governors, to local officials, and of importance to a wide range of important functions; education, law enforcement, health, transportation, and so on. The need for high quality information has been heightened recently not only because of the pressing social and political issues such as educational assessments to name just one issue, which I know you are concerned with, but also because of the scandals ranging from defense technology procurement to the Department of Housing and Urban Development. The prevention of fraud, waste, and abuse in all areas of governmentyrequires accurate, well organized, and easily accessible information. Clearly, what our nation needs is an information policy law which promotes a carefully balanced burden-benefit analysis of Federal information. I have tried to fulfill this goal with the introduction of my legislation. I hope you will personally take the opportunity to evaluate the National Governors Association position and your own views on this issue.

I certainly remain open to continuing the dialogue over the important issues of Federal paperwork reduction with you and the National Governors Association. Please do not hesitate to share your views and proposals with me.

Sincerely,

Jeff Bingaman

Jeff Bingaman
Chairman
Subcommittee on Government
Information and Regulation

UNIVERSITY OF VIRGINIA
HEALTH
SCIENCES
CENTER
OFFICE OF THE VICE PRESIDENT

February 22, 1990

The Honorable John Glenn
Chair
Committee on Governmental Affairs
U.S. Senate
Washington, D.C.

Dear Senator Glenn:

I understand that my request to present testimony before your Committee on February 22 regarding the bill S. 1742, "Federal Information Resources management Act of 1989," cannot be honored. However, at the suggestion of Committee Staff Director, Dr. Leonard Weiss, I am submitting my written statement and request that it be made part of the official record.

As I discussed with your staff, my concern is not with S. 1742, but with the bill's companion measure, H.R. 3695. If enacted into law, the information dissemination provisions in that proposal could jeopardize the National Library of Medicine's (NLM) medical information services. Specifically, H.R. 3695 contains language at sec. 103(c)(2)(D) that could seriously restrict the NLM's ability to assure the quality of its databases through its leasing arrangements.

I believe it is most urgent that this is understood by Committee members who will be involved in reconciling the two measures. The quality, integrity, and reasonable fees associated with the NLM's vitally important medical information services should be sustained.

Cordially,

Don E. Detmer, M.D.
Vice President for Health Sciences

DED/rj

HEALTH SCIENCES CENTER BOX 179, CHARLOTTESVILLE, VIRGINIA 22908 804-924-2444

UNIVERSITY OF VIRGINIA
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CENTER

OFFICE OF THE VICE PRESIDENT

STATEMENT FOR THE RECORD

I appreciate the opportunity to present this statement for the official record of hearings on S. 1742 "Federal Information Resources Management Act of 1989." As the Committee is aware, the bill, and its counterpart measure in the House of Representatives, H.R. 3695, include new provisions affecting Federal information dissemination activities. My statement is directed to their impact on the quality and integrity associated with the medical information services of the National Library of Medicine.

While S. 1742 would not have a detrimental affect on the NLM services, H.R. 3695 at sec 103(c)(2)(D) most certainly would. I am pleased that similar provisions do not appear in S. 1742, and sincerely hope they will not be included in any compromise bill.

H.R. 3695 at sec 103(c)(2)(D) would prohibit Federal agencies from exercising controls over government data redisseminated by the public. This may sound reasonable--even desirable. But, these key and perhaps little understood provisions when applied to the National Library of Medicine's information services, would be extremely damaging. They have the potential of lowering the quality and integrity of the NLM databases provided through the private sector. They would do this by prohibiting the NLM from entering into formal licensing agreements with other organizations, both public and private, that receive the NLM data and then provide information services based on them. The agreements contain crucial provisions to ensure the quality, integrity, and recovery of access costs through reasonable fees associated with the MEDLARS (Medical Literature Analysis and Retrieval System) databases.

The NLM has been known for 150 years for the quality and integrity of its products and services. This quality has been acknowledged by the medical community and relied upon no matter how or where the products and services are made available. NLM's comprehensive assurance for database integrity is extremely important to those who must rely on the information for treating patients. We cannot allow mediocrity to slip into medical information services, and without quality controls, this would surely happen.

I agree that ensuring information flow to the public is a government responsibility, but, certainly, this can be accomplished without causing harm to the most important medical information resource in this country.

Don E Detmer, M.D.

Don E. Detmer, M.D.

HEALTH SCIENCES CENTER BOX 179, CHARLOTTESVILLE, VIRGINIA 22908 804-924-2444

AAU
Association of American Universities

President

January 24, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
340 Senate Dirksen Office Building
Washington, DC 20510-6250

Dear Senator Glenn:

The Paperwork Reduction Act is, as you know, an important element in the nation's effort to achieve a proper balance between the need for the federal government to collect, maintain, and disseminate important information and the need to prevent unnecessary and inappropriate paperwork burdens on individuals and organizations. Research universities are particularly sensitive to both of these needs. They rely heavily for research in a wide variety of fields on information collected and made available by government. On the other hand, they are mindful of the potential dangers of excessive or intrusive government regulation and its implications for the independence of academic research.

With these considerations in mind, I want to share with you a few principles which we believe should guide the Senate's consideration of legislation to reauthorize the Paperwork Reduction Act. These comments reflect the analysis of the implications of federal information policy for academic scholarship in a paper published by the AAU in early 1989. Enclosed for your information is a copy of that paper.

A critical task of the Paperwork Reduction Act reauthorization is to develop legislative guidance that will enable the Office of Management and Budget to engage in effective information management without intruding on the substantive decision-making authority of other federal agencies. A second and equally important aim is that the information management activities of the OMB should enhance public access to information and public opportunity to comment on OMB activities.

We believe that the reauthorization legislation should amend the Act in several respects to achieve these two aims. First, the legislation should expressly limit the authority of the OMB to challenge agency policy judgments reflected in information collection proposals. OMB review should be limited to problems with survey instruments, such as technical flaws or the potential for unnecessary duplication of

Suite 730 • One Dupont Circle • Washington, DC 20036 • 202/466-5030

effort by those responding to information collection documents. Second, the reauthorization should state explicitly that public access to information in government hands is a policy priority. Third, the legislation should spell out how the public will have the opportunity to comment on OMB information collection and dissemination decisions. Fourth, the legislation should include statutory language to ensure that reliance on the private sector for the dissemination of information generated with public funds does not make information less available by raising substantially the fees required for acquisition of the information. Finally, it is important that the new legislation reflect congressional awareness that an increasing amount of information is now collected, maintained, and disseminated in electronic form. This trend increases the importance of legislative guarantees of access to such information.

The reauthorization of the Paperwork Reduction Act is a valuable opportunity to assess and refine some aspects of federal information policy. I hope the committee will proceed quickly to enact amending and reauthorizing legislation.

Sincerely,

Robert M. Rosenzweig

Robert M. Rosenzweig

RMR/jpk

Enclosure

cc: Members of the Senate Committee on
Governmental Affairs

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A
U

Association of American Universities

President

February 14, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
340 Senate Dirksen Office Building
Washington, DC 20510-6250

Dear Senator Glenn:

Please allow me to add to my prior remarks regarding the Paperwork Reduction Act and its importance to the nation's research universities. My earlier comments suggested that certain principles be taken into account during the Senate's deliberations on amendments to the Act. Those principles reflected primarily on issues of open communications and ensuring the availability and dissemination of government information to the public. I wish at this time to comment further regarding another area of great importance to the university community, which is the issue of dealing with agency rule-making, regulations and administrative requirements.

The Paperwork Reduction Act includes provisions that establish government-wide standards, limits and controls for agency information collection requirements in virtually any context. These apply to data-gathering, record-keeping, reporting and similar requirements for any purpose. The Act also includes provisions for public participation in all agency rule-making and other activities involving information collection requirements. The Act creates the Office of Information and Regulatory Affairs in OMB to oversee and assure implementation of its provisions.

It is our experience that the public participation provisions of the Act add much-needed balance, equity and limits to agency rule-making, management and administrative activities. We have found in several instances of great importance to universities that OIRA functioned to ensure that due process was accorded and that the agencies observed the government-wide standards and limits established by Congress in the Act.

We believe that the responsibilities and authority provided to OMB for these purposes by the Act are appropriate and should not be reduced, and that information collection proposals reflecting agency substantive decision-making and policy judgments should not be excluded from the public comment provisions of the Act or from the requirements for OMB prior review and approval. Our recent experience in such areas as animal welfare rules, scientific misconduct policy and conflict of interest guidelines clearly illustrate how important this is.

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In this context, we believe the reauthorization legislation should retain certain key features of the Act. First, to reiterate, OMB responsibility and authority as regards the public protection and participation provisions should be left fully intact. Second, OMB should retain at least selective triennial review and approval authority regarding existing agency collection requirements. This is essential for attempts to deal with the phenomenon of bureaucratic accretion which the National Academy of Sciences has identified as a costly national problem and impediment to academic research. Third, the ability of OMB to apply and enforce the standard of necessity to an agency mission in reviewing information collection proposals should be maintained. Fourth, in a similar fashion, OMB review responsibility and authority should continue regarding the determination of whether agency information collection proposals have timely practical utility for the agency. Finally, we urge your adoption of any amendments to the Paperwork Reduction Act which would encourage, support or require efforts similar to the Federal Demonstration Project in administrative standardization and simplification of federally-sponsored academic research.

The Paperwork Reduction Act is a proven, important means for constraining the imposition of unnecessary and excessive agency requirements on academic research. In addition to ensuring that the Act provides for the availability and dissemination of government information to the public, as reflected in my letter of January 24, we urge the Committee to fully retain those provisions of the Act which are essential to its success.

Sincerely,

Robert M. Rosenzweig

Robert M. Rosenzweig

RMR/djp

cc: Members of the Senate Committee on
Government Affairs

NATIONAL COORDINATING COMMITTEE
FOR THE PROMOTION OF HISTORY

NCC

Administrative Offices: 400 A STREET SE
WASHINGTON, DC 20003(202) 544-2422

DR. PAGE PUTNAM MILLER
Director

Members

American Historical Association
Organization of American Historians
Society of American Archivists
Western History Association
Phi Alpha Theta
Southern Historical Association
American Association for State and Local History
American Military Institute
American Political Science Association
Society for Historians of American Foreign Relations
Society for History Education
ABC-CLIO
Coordinating Committee on Women in the Historical Profession
Conf. Group on Women's History
History of Science Society
Society for the History of Technology
Berkshire Conf. of Women Historians
Council on Peace Research in History
Immigration History Society
Conference Group for Central European History
Women Historians of the Midwest
Georgia Association of Historians
Polish American Historical Association
Agricultural History Society
American Library Association-Library History Round Table
Federation of State Humanities Councils
Society for History in the Federal Government
National Council on Public History
National Archives Assembly
American Association for the History of Medicine
Association for Documentary Editing
Midwest Archives Conference
National Association of Government Archives and Records Administrators
Federation of Genealogical Societies
Oral History Association
Mid Atlantic Regional Archives Conference
American Society for Legal History
American Studies Association
Council on America's Military Past
Economic History Association
History Associates, Inc.
Institute for Historical Study (San Francisco)
National Council for the Social Studies
New England Archivists
Nuclear Age History & Humanities Center
Public Works Historical Society
Society of Georgia Archivists
Society for Industrial Archeology
Southern Association for Women Historians

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Oklahoma
Pennsylvania
Texas
Utah
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Wisconsin

February 28, 1990

Senator John Glenn
Chairman, Governmental Affairs Committee
340 Dirksen Senate Office Building
U.S. Senate
Washington, DC 20510

Dear Senator Glenn,

On behalf of the fifty member organizations of the National Coordinating Committee for the Promotion of History, which is composed of this nation's major professional historical and archival organizations, I am writing to request that the following statement on S. 1742 be included in the February 22, 1990, hearing record of the Senate Committee on Governmental Affairs.

NCC Statement on S. 1742

Historians and archivists have a primary interest in the preservation and availability of federal information. Thus NCC members were pleased to see the expansion of the Paperwork Reduction Act to include some of the broader aspects of information policy. We support the efforts of Senator Bingaman, who has stated his concern for "the need for an information policy for the federal government which recognized a comprehensive live-cycle management of information."

One portion of the bill of particular interest to historians and archivists is Title III, "Management of Public Records," which includes provisions for increasing the authority of the U.S. Archivist. As a pending federal law suit regarding the destruction of National Security Council computer tapes illustrates, there is lack of clarity in existing law over who has authority over federal records policies. We particularly support the section that would give the U.S. Archivist responsibility for establishing standards for interpreting the definition of records and for establishing standards for the establishment and maintenance of adequate and proper documentation of federal agencies' programs, policies, organization, functions, decisions, procedures and essential transactions. The NCC also gives its strong support to Section 2906 which would strengthen the U.S. Archivist's authority to inspect agency records and records management practices.

In Section 108, "Establishment and Operation of Federal Information Locator System," the NCC endorses the plan to undertake a year long study to determine the appropriate procedure for developing and implementing the locator system. As described in S.1742, the locator system would have responsibility for both making available data on information collection requests and for assisting federal employees, as well as the public, in locating federal information products. As the system evolves, NCC would recommend that the two functions be separated. The former serves more as a management tool, while the second would provide much needed bibliographic control over federal government information products. A General Accounting Office survey of federal agencies found the number of government publications in electronic format tripled between 1984 and 1988. In 1987 alone, civilian agencies disseminated more than 7,500 government information products in electronic format. Since these electronic products were not issued to the public through traditional channels such as the Government Printing Office or the Consumer Information Center, there has been no central locator file for gaining bibliographic control of these information products.

The NCC is troubled by Subsection (3)(E), which includes a restrictive list of items that an agency is required to consider in determining how to carry out its public information dissemination functions. Of special concern is the item requiring consideration of "equivalent" public or private information products. The trend toward privatization of government information, which in most cases means more expensive information, is a grave concern to scholars. Also, in light of past experience with the Office of Management and Budget expanding its control over information dissemination, there are reservations about the possibilities within this section for increasing OMB's review authority. This authority could be used by OMB to delay or prevent dissemination of government information products which agencies have deemed appropriate to their missions. We recommend that Subsection (3)(E) be eliminated from S. 1742.

NCC strongly supports the purposes of S. 1742 as set forth in Section 3501. It is very encouraging to the research community to see the affirmation of efforts "to ensure the greatest possible public benefit from information collected, maintained, used, disseminated, and retained by the Federal government." In implementing this goal, we urge an amendment to Section 106 on "Federal Agency Responsibilities" that would require that agencies provide to the Superintendent of Documents for distribution to the Federal Depository Library Program publications in electronic format. We realize that not all Depository Libraries may be equipped to handle electronic products, thus a system of regional centers may need to be developed. But every effort must be made to ensure that citizens have access to government information. Access to government information is a public right and a corner stone of our democratic government.

Thank you for this opportunity to express for the hearing record our thoughts on S.1742.

Sincerely,

Page Putnam Miller, PhD
Director

AMERICAN LIBRARY ASSOCIATION
50 EAST HURON STREET • CHICAGO, ILLINOIS 60611 • (312) 944-6780

February 9, 1990

The Honorable John Glenn
Chairman
Governmental Affairs Committee
Senate Office Building
Washington, D.C. 20510

Dear Senator Glenn:

On January 10, 1990 at the ALA Midwinter Meeting held in Chicago, the governing body of the American Library Association, the ALA Council, adopted the enclosed Resolution on Reauthorization of the Paperwork Reduction Act.

The American Library Association recommends to the sponsors of HR 3695 and S. 1742 and other members of Congress that these bills have good provisions as outlined, and requests that the attached resolution receive favorable consideration.

Sincerely,

Linda F. Crismond
Secretary to Council

Enclosure

AMERICAN LIBRARY ASSOCIATION
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RESOLUTION ON REAUTHORIZATION OF THE PAPERWORK REDUCTION ACT

Whereas, The American Library Association has long held that the federal government has an affirmative obligation and responsibility to disseminate government information, regardless of format, to the public; and

Whereas, Access to government information is a public right and a principal function and goal of the federal government; and

Whereas, Attempts to reduce the paperwork burden on the public should not result in diminished access to government information; and

Whereas, The Paperwork Reduction Act (PRA) as implemented by the Office of Management and Budget (OMB) has resulted in less government information and less public access to government information; and

Whereas, OMB has interpreted PRA to encourage privatization of federal information products and services to the detriment of public access to government information; and

Whereas, Congress is now considering PRA reauthorization legislation [HR 3695, S. 1742] which is the result of Congressional dissatisfaction with OMB's past efforts to restrict collection and dissemination of federal information and to interfere with agency regulatory functions; and

Whereas, ALA has recommended revisions to these bills to ensure equal and ready access to government information; and

Whereas, Portions of the proposed legislation do promote public access to government information; and

Whereas, The dissemination sections of the bills still contain provisions that would have long term negative consequences to users of government information; and

Whereas, These provisions will significantly increase the role in government information dissemination policy of the OMB, restrict dissemination and privatize government information; now, therefore be it

Resolved, That the American Library Association communicate to the sponsors of HR 3695 and S. 1742 and other members of Congress that these bills have good provisions including:

recognizing the importance of public information and the government's responsibility to ensure the flow of information to the public;

establishing the affirmative obligation of government agencies to disseminate information, regardless of format, and in ways which maximize its usefulness;

requiring agencies to provide government publications for distribution through the Depository Library Program, including the House bill's provision for publications in electronic formats;

providing greater public accountability for OMB and agency decision making;

requiring agencies to utilize the Government Printing Office (GPO) for the production and dissemination of information products and services; and be it further

Resolved, That the American Library Association urge the sponsors of HR 3695 and S. 1742 and other members of Congress, to amend these bills to include:

Retaining in Congress overall information dissemination authority and strengthening Congressional oversight responsibility;

Ensuring that responsibility for implementing government information policies remains with the head of each federal agency, rather than the OMB;

Guaranteeing that public access to electronic government information is provided through depository libraries;

Requiring federal agencies to disseminate government information to the public, regardless of format, complete with software, indexes and documentation needed to facilitate the usefulness and public access to government information;

Eliminating the list of restrictive factors [S. 1742, subsec. (3) (E), pp. 18-19, and HR 3695, subsec. (2) (E), pp. 12-13] required to be considered by an agency in determining how to carry out its public information dissemination functions. In particular, the fourth item on that list, requiring consideration of "equivalent" public or private information products or services, denigrates the role of the government agency and elevates the role of the private sector at the expense of the public;

Granting interested parties the right to petition agencies for review of significant changes in policy regarding information dissemination, such as that provided for in the Solid Waste Disposal Act, 42 U.S.C. 7004;

Assuring that public notice of agency plans to change dissemination policies precede any review by the OMB;

Limiting the reauthorization of the Paperwork Reduction Act to two years; and be it further

Resolved, That copies of this resolution be transmitted to the appropriate Congressional committees and Federal officials.

ADOPTED BY THE
COUNCIL OF THE AMERICAN LIBRARY ASSOCIATION
January 10, 1990, in Chicago, Illinois

Linda F. Crismond

Linda F. Crismond, Secretary of Council

WASHINGTON OFFICE
AMERICAN LIBRARY ASSOCIATION
110 MARYLAND AVENUE, N.E. • WASHINGTON, D.C. 20002 •

March 8, 1990

The Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate
Room 340 Dirksen Senate Office Building
Washington, D.C. 20510-6250

Dear Senator Glenn:

The American Library Association deeply appreciates the opportunity afforded our President, Patricia Wilson Berger, to appear as a witness at the hearings you chaired last month on S. 1742, the Federal Information Resources Management Act of 1989. The corrected transcript of her testimony is enclosed along with the proposed amendments to S. 1742 which she said would be submitted for the record. Also enclosed for the record are two letters of support for the Association's statement on the bill. One letter is from Richard M. Cheski, State Librarian of Ohio, who is President of the Chief Officers of State Library Agencies; the other is from Phyllis Van Orden from Florida State University, who is President of the Association for Library and Information Science Education.

Sincerely,

Eileen Cooke

Eileen D. Cooke
Director
ALA Washington Office

Enclosures

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"(5) conduct a periodic review of agency compliance, identify problems, and report the results to the Senate Committee on Governmental Affairs and the House Committee on Government Operations; and

"(6) recommend to the President for submission to the Congress legislative proposals to remove inconsistencies in laws and practices involving privacy, confidentiality, and disclosure of personal information.".

(e) INFORMATION DISSEMINATION FUNCTIONS OF THE ADMINISTRATOR.—Section 3504(h) of title 44, United States Code, is amended to read as follows:

"(h)(1) The information dissemination functions of the Administrator shall include the responsibility to—

"(A) develop nonbinding policy ~~develop policy guidelines, to be issued after~~ guidelines, to assist ~~notice and receipt of public comment, which shall enable~~ Federal agencies to fulfill information dissemination functions and activities;

"(B) promote policy research and development in the area of information dissemination~~, as a basis for developing effective guidance for program and policy development in the Federal agencies~~;

"(C) establish procedures for monitoring compliance ~~systematic oversight~~ with section 552 of Title 5 and related ~~to ensure that the principles, purposes, and guidance~~ information disclosure laws; ~~expressed in this subsection are carried~~ out; and

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"(D) coordinate the identification of priorities for developing uniform technical standards.

"(2) In furthering the provisions of paragraph (1)(D)—

"(A) the National Institute of Standards and Technology shall, after consultation with the public and appropriate agencies, issue uniform technical standards; and

"(B) the Office of Management and Budget shall encourage the use of National Institute of Standards and Technology standards through its policy guidelines and assistance, and monitor the effectiveness of such standards.

"(3) ~~Guidance~~ Nonbinding policy guidelines issued by the Administrator under paragraph (1) shall—

"(A) be developed in consultation with central information management agencies possessing governmentwide dissemination authority under law;

"(B) strengthen public access to Government information, regardless of format, consistent with existing law including—

"(i) making public information products and services available on timely, equitable and equal basis to all persons; and

"(ii) ~~encouraging a diversity of public and private information products and services;~~ assuring the public reasonable and equitable access to government information;

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"(C)(i) maintain an affirmative role for Federal agencies in the dissemination of Government information, consistent with law; and

encourage a diversity of public and
"(ii) ~~reflect a view that a public and private sector~~
private providers for public information products
~~sharing of responsibility for information dissemination is~~
and services consistent with the Government's
~~sound public policy;~~
obligation to disseminate public information;

"(D) ~~reflect that the head of each agency has the~~
(D) See PAGE 18-A
~~primary responsibility for management of Federal information resources; and~~

(E) OMIT
"(E) ~~require an agency, in determining how to fulfill its public information dissemination functions, to consider—~~

"~~(i) whether dissemination is required by law;~~

"~~(ii) whether dissemination is necessary for the proper performance of agency functions;~~

"~~(iii) whether disseminating public information would assist in public oversight of agency operations or would promote the general social or economic welfare of the United States;~~

"~~(iv) if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the dissemination objectives of the agency product or service;~~

"(D)reflect that the head of each agency has the final decision making responsibility for establishing and maintaining an information dissemination management system in accordance with procedures set out in §3509 and primary responsibility for the remaining areas of information resources management.

(E) OMIT

"~~(v) dissemination methods that will maximize the utility of the information to the public; and~~

"~~(vi) the economy and efficiency of Government operations.~~".

SEC. 105. PAPERWORK REDUCTION GOALS AND DEADLINES.

Section 3505 of title 44, United States Code, is amended to read as follows:

"§ 3505. Paperwork reduction goals and deadlines

"In carrying out the functions under this chapter, the Administrator shall upon the date of the enactment of the Federal Information Resources Management Act of 1989—

"(1) set a goal to reduce by September 30, 1990, the burden of Federal collections of information existing on September 30, 1989, by at least 5 percent;

"(2) for the fiscal year beginning on October 1, 1990, and the following fiscal year, set a goal to reduce the burden of Federal collections of information existing at the end of the immediately preceding fiscal year by at least 5 percent;

"(3) identify initiatives to reduce the burden of the Federal collections of information associated with individuals, businesses, educational institutions, and State and local governments, particularly with respect to the burden associated with Federal procurement and grant programs; and

"(4) identify areas of duplication in information collection requests and develop a schedule and methods for eliminating duplications.".

SEC. 106. FEDERAL AGENCY RESPONSIBILITIES.

Section 3506 of title 44, United States Code, is amended—

(1) (SEE PAGE 20-A)

(1) ~~in subsection (a) by striking out "Each" and inserting in lieu thereof "The head of each"~~;

(2) in subsection (b)—

(A) by inserting "(1)" before "the head of each agency"; and

(B) by adding at the end thereof the following new paragraphs:

"(2)(A) Each official designated under paragraph (1) shall appoint a Chief Information Resources Management Official who shall—

"(i) report to the senior official (except in the case that the Chief Information Resources Management Official may be the senior official);

"(ii) be in the competitive service or in the senior executive service; and

"(iii) be a career appointee.

(1) in subsection (a) by striking out "Each" and inserting in lieu thereof "The head of each"; and by adding at the end thereof the following sentence: The head of each agency shall have final decision making authority for establishing and maintaining an information dissemination management system in accordance with procedures set out in §3509.

"(1) establish an agency-wide program of information resources management;

"(2) develop, implement, and evaluate formalized training programs in consultation with appropriate agencies, on information resources management concepts, and educate program officials about information resources management as a managerial discipline requiring all managers to take responsibility for life cycle management of information resources;

"(3) develop information systems, processes and procedures that—

"(A) enhance the sharing of common data across program and agency lines consistent with law; and

"(B) maximize the usefulness and timely release of Government information to all users within and outside the agency~~, including the public, where appropriate~~;";

(D) in paragraph (4) (as redesignated by subparagraph (A) of this paragraph) by amending such paragraph to read as follows:

"(4) systematically inventory and maintain current, complete records of the agency's information resources, including its major information systems, its automatic data processing equipment, and its information-skilled personnel, for use in developing and updating the agency's information resources management plans and for informing relevant public outside the agency;";

(E) in paragraph (9) (as redesignated by subparagraph (A) of this paragraph) by inserting "and retaining" after "sharing, dissemination,";

(F) by inserting after paragraph (9) (as redesignated by subparagraph (A) of this paragraph) the following paragraph:

"(10) establish and maintain an information dissemination management system that shall—

"(A) ensure that the public has timely, equitable, and equal access to the agency's ~~public~~ information products and services and that agency information dissemination programs disseminate agency ~~public~~ information products and services in an efficient, effective, and economical manner;

"(B) plan and budget for information dissemination at the time information is created or collected, and at other appropriate steps during the information life cycle;

(C) follow the decision making procedures set out in §3509 whenever the agency proposes to initiate,

"(C) ~~provide to the public adequate advance notice when the agency initiate~~s, ~~terminates~~, ~~or~~

terminate, or significantly modify a major ~~significantly modifies significant public information~~ information dissemination program; ~~products and services;~~ and

"(D) provide to the Superintendent of Documents for distribution to the Federal Depository Library Program all publications required by chapter 19 of this title to be made ~~available;~~"; available, including government publications in electronic formats;"; and

(G) in paragraphs (11) and (12) (as redesignated by subparagraph (B) of this paragraph) by amending such paragraphs to read as follows:

"(11) consistent with government-wide policies and guidance periodically evaluate and, as needed, improve, the accuracy, completeness, reliability, and timeliness of data and records contained within Federal information systems and the capabilities of such systems for ensuring—

"(A) public access to public information; and

"(B) privacy, confidentiality, and security;

"(12) develop and annually update the agency's information resources management plan in accordance with the appropriate guidelines issued by the Office of Information and Regulatory Affairs, a component of which shall be a five-year plan for meeting the information requirements and the information technology needs of the agency's programs and activities.";

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New Section 3509 of Title 44, United States Code

SEC. 107-A FEDERAL AGENCY INFORMATION DISSEMINATION ACTIVITIES. Section 3509 of Title 44, United States Code, is amended by renumbering §3509 et seq. as 3510-3521 and inserting a new §3509, entitled "Federal Agency Information Dissemination Activities." This section establishes policy making procedures consistent with the objectives strengthening agency information resources management and improving the accountability of all federal agencies to Congress and the public for the responsibilities assigned under this chapter. Section 3509 includes the following new subsections:

(a): any regulation under this section shall be proposed and promulgated in accordance with section 553 of Title 5, U.S. Code related to rulemaking, except that each agency shall provide opportunity for public hearing prior to promulgation of such regulations.

(b): Simultaneous with the publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Administrator a copy of any proposed rule which sets out the initiation, termination or modification of a major information dissemination program, and upon request, information necessary to make the Administrator's recommendation provided for pursuant to this section. The Administrator is prohibited from reviewing agency proposals prior to their publication in the Federal Register.

(c): Within thirty days after the notice of proposed rulemaking is published in the Federal Register, the Administrator may file comments. These comments will become part of the agency's public file maintained in accordance with §3506(d), as amended [see bill p.25].

(d): If the Administrator fails to comment in the thirty day period, he shall have no authority to disapprove or otherwise delay the rulemaking process.

(e): When the final rule is published in the Federal Register, the agency shall explain how changes made in the information dissemination program at issue responds to the comments, if any, filed by the Administrator or the public, or explain why it rejected those comments. [similar to Title 44 §3504(h)(3)].

(f): The Administrator has no authority to disapprove any agency dissemination program specifically set out by agency rulemaking. [similar to §3504(h)(4)].

(g): Each agency which has promulgated rules concerning the initiation, termination or modification of a major information dissemination program shall on an annual basis prepare and transmit to the House Committee on Government Operations, the Senate Committee on Governmental Affairs, the House and Senate Committees on Appropriations, and the committees of the Congress having jurisdiction over legislation relating to the operations of the agency, a written report summarizing these activities, including an explanation of how any changes adopted carry out the provisions of §3506.

New section 3522 of Title 44, United States Code

SECTION 112-A. PETITION FOR REVIEW.

Title 44, United States Code, is amended by adding at the end thereof the following new section:

§3522. Petition for Review of Agency Information Dissemination Decisions*

Public participation in the development, revision, implementation and enforcement of regulations and programs under the information dissemination provisions of this Act shall be provided for, encouraged and assisted by federal agencies.

Any person adversely affected within the meaning of this law and relevant agency statutes from Section 702 of the Administrative Code may seek reconsideration of an agency decision and, after exhausting agency administrative procedures, may file an appeal in the Court of Appeals of the District of Columbia:

(a)against the head of an agency where there is alleged a failure of the agency to perform any act or duty under this Act; or

(b)against any person, agency or government instrumentality, to the extent permitted by the Eleventh Amendment to the Constitution, who is alleged to be in violation of any standard, regulation or requirement which has become effective pursuant to this Act.

*This language was adapted from the Petition for Regulation; Public Participation section in the Solid Waste Disposal Act [§7002 and 7004 of 42 U.S.C 6901]:

AMERICAN LIBRARY ASSOCIATION PROPOSALS

PROPOSED LANGUAGE ON TWO-HOUSE APPROVAL BY JOINT RESOLUTION
RE: S. 1742

Add subsection to 3504(h).

3504(h)(4): All policy guidelines, oversight procedures and any other guidance by the Administrator concerning agency information dissemination activities must be approved by Congress through the positive joint resolution process, as set out in sections 35__ to 35__ of this legislation. (New provisions for joint resolution process to be added to section 109 of S. 1742. These provisions are set out below.)

Section No__ Report to Congress.

(a) Whenever the Administrator, pursuant to section 3504(h) (in S. 1742) finds it necessary to (1) develop policy guidelines which shall enable Federal agencies to fulfill information dissemination functions and activities or to (2) establish procedures for systematic oversight of such functions and activities, he shall prepare a report specifying the guidelines and procedures he finds are necessary. The Administrator shall transmit the report (bearing an identification number) to the Congress together with a declaration that, with respect to each guideline and procedure included in the report, he has found the guidelines and procedures are necessary to carry out the purposes set out in section 3501

(b) The Administrator shall have the report delivered to both Houses on the same day, and to each House while it is in session, except that no more than three reports may be pending before Congress at one time. In his declaration transmitting the report, the Administrator shall specify with respect to each policy guideline and oversight procedure how these proposed actions are consistent with the following purposes of S. 1742:

A) to strengthen public access to government information, regardless of format;

B) to ensure the greatest possible public benefit from information collected and disseminated by the Federal government;

C) to make government information, including information products and services, available on a timely, equitable and equal basis to all persons;

D) to maintain an affirmative role for Federal agencies in the dissemination of government information; and

E) to ensure that the head of each agency has the primary responsibility for management of Federal information resources.

In addition, the Administrator's report shall include an implementation section which shall describe in detail (1) the actions necessary or planned to implement the policy guidelines and oversight procedures, (2) the anticipated nature and substance of any directives and other administrative actions which are expected to be required for the implementation, (3) any preliminary actions which have been taken in the implementation process, and (4) a projected timetable for completion of this process. The Administrator's report shall also estimate any reduction or increase in expenditures and describe any improvements in the management and delivery of Federal information which it is expected will be realized as a result of the proposed policy guidelines and oversight procedures;

(c) Any time during the period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it, but before any resolution described in section ___ has been ordered reported in either House, the Administrator may make amendments or modifications to the report, consistent with sections ___ of this title, which modifications or revisions shall thereafter be treated as a part of the report originally transmitted and shall not affect in any way the time limits otherwise provided for in this chapter. The Administrator may withdraw the plan any time prior to the conclusion of 90 calendar days of continuous session of Congress following the date on which the report is submitted to Congress.

Section No.___ Limitation on Powers.

(a) The Administrator may implement policy guidelines and oversight procedures with respect to agency information dissemination functions only if a report is prepared and transmitted to Congress in accordance with sections ___ and if said report is approved by Congress as described in sections ___. Any directives, circulars, or administrative orders issued by the Administrator which affect an agency's ability to act consistent with the purposes of S. 1742, as directed above in section ___ shall be considered policy guidelines and oversight procedures, and properly subject to the requirements of sections ___ to ___.

(b) Any Federal agency or aggrieved individual may appeal to the House Government Operations Committee or the Senate Governmental Affairs Committee in the event that an agency or individual believes that information dissemination policy guidelines or oversight procedures have been established by the Administrator without the approval of Congress as required by law.

PROCEDURES FOR APPROVAL OF OMB INFORMATION DISSEMINATION GUIDELINES

Section 3504 of title 44, United States Code, is amended by adding after subsection (h) the following:

(i) The OMB information dissemination guidelines proposed by the Director shall be effective upon approval by the President of a resolution, as defined in subsection (i)(3), with respect to the guidelines, if such resolution is passed by the House of Representatives and the Senate, within the first period of 60 calendar days of continuous session of Congress after the date on which the guidelines are transmitted to Congress. Failure of either House to act upon such resolution by the end of such period shall be the same as disapproval of the guidelines.

(8) The vote on final passage of the resolution shall occur immediately following the conclusion of debate on the resolution.

(9) subsections (i)(3) - (i)(8) are enacted by Congress --

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions with respect to any information dissemination guidelines transmitted to Congress; and they supercede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

AMERICAN LIBRARY ASSOCIATION PROPOSALS

(10) Any OMB information dissemination guidelines which becomes effective through the procedures set forth in the subsection shall be printed --

(A) in the Statutes at Large in the same volume as the public laws; and

(B) in the Federal Register.

(1) The Director shall transmit the information dissemination guidelines to the Congress;

(2) For purposes of this section --

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(3) For purposes of this subsection, "resolution" means only a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That the Congress approves the information dissemination guidelines transmitted to the Congress by the Director of the Office of Management and Budget on [ ], 19[ ]." The blank spaces therein are to be filled appropriately.

(4) No later than the first day of session following the day on which the OMB information dissemination guidelines is transmitted to the House of Representatives and the Senate under subsection (i)(1), a resolution [as defined by subsection (i)(3)] shall be introduced in the House by the chairman of the Committee on Government Operations, or by a Member or Members of the House designated by such chairman, and shall be introduced in the Senate by the chairman of the Governmental Affairs Committee, or by a Member or Members of the Senate designated by such chairman.

(5) A resolution with respect to the information dissemination guidelines shall be referred to the Governmental Affairs Committee of the Senate and the Committee on Government Operations of the House by the President of the Senate or the Speaker of the House of Representatives, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 45 calendar days of continuous session of Congress following the date of such resolution's introduction.

(6) When the committee has reported a resolution with respect to the OMB information dissemination guidelines, it is at any time thereafter in order for any Member of the respective House to move to proceed to the consideration of the resolution. This motion is highly privileged and is not debatable. The motion shall not be subject to amendment, or to a motion to postpone, or a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

(7) Debate on the motion shall be divided equally between individuals favoring and individuals opposing the resolution.

The State Library of Ohio
65 South Front Street, Columbus, Ohio 43266-0334
614/ 644-7061

February 20, 1990

Senator John H. Glenn
United States Senate
Hart Senate Office Bldg., Room 503
Washington DC 20510

Dear Senator Glenn:

The Chief Officers of State Library Agencies share and support the American Library Association's position on public access to government information in relation to S.1742.

It is difficult to overstate the importance of access to government information to the citizens of our respective states. It is this open access to the government's policies, programs and actions that makes our democratic system of government possible.

We urge the incorporation of the two broad principles proposed by the American Library Association:

(1) the affirmative obligation of the federal government to disseminate government information to the public; and

(2) the emphasis of government information policy should be placed on the public's right to that information -- regardless of format.

As the regional federal depository library for the state of Ohio, we are especially concerned over the potential decrease of government information available to the citizens of Ohio.

I appreciate your attention to this important concern.

Very truly yours,

Richard M. Cheski, State Librarian
and President, Chief Officers of
State Library Agencies

RMC:nc

CC: Eileen Cooke, Director, ALA Washington Office

LIB 1002

ALISE

February 23, 1990

The Honorable John Glenn
Chairman, Senate Committee
 on Governmental Affairs
United State Senate
Washington, D. C. 20540

Dear Senator Glenn:

As President of the Association for Library and Information Science Education (ALISE), I am writing in support of the American Library Association's statement on S.1742, the "Federal Information Resources Management Act of 1989."

Members of ALISE are the faculty of the country's library schools, the teachers of the next generation of librarians. We are greatly concerned about equitable access to information regardless of the format of that information, and that is a principle stressed in our classrooms. We recognize that libraries are the most likely source of information about the government's policies and programs for the majority of citizens. We are proud of the role libraries have played in educating citizens for informed participation in a democracy, and want to assure the continuation of the library in that role.

Patricia Wilson Berger, President of the American Library Association, has argued that position eloquently. We want to support her plea that Congress retain its overall information dissemination authority and strengthen its oversight responsibility. It is essential that the decision making authority for the dissemination of information authority be vested with individual agencies that are accountable to the public for their actions.

Association for
Library
and Information
Science Education
5623 Palm Aire Drive
Sarasota, FL 34243-3702
813/355-1795

We urge the Committee to take seriously the responsibility of disseminating government information, no matter what format the information is in, through the system of Depository Libraries already in place to assure the citizens' access to that information. If the information happens to be in electronic form, rather than printed form, it is necessary that appropriate software, indexes, or requisite documentation be disseminated along with the information itself. Access, after all, is the goal.

With this letter, we are enclosing a copy of the American Library Association's Resolution on the Paperwork Reduction Act, for we are in complete agreement with its purpose and intent.

We appreciate your consideration of our letter of support.

Sincerely,

Phyllis Van Orden

Phyllis Van Orden
President
School of Library and
Information Studies
Florida State University
Tallahassee, FL 32306-2048

cc Ilse Moon, Executive Secretary
ALISE Board

PVO/jmd

Medical Library Association

Suite 300
Six North Michigan Avenue
Chicago, Illinois 60602
312 419 9094

MLA

March 6, 1990

Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
SD-340
Washington, D.C. 20510-6250

Dear Senator Glenn:

The Medical Library Association (MLA) is a professional organization which represents approximately 5000 individuals and institutions involved in the management and dissemination of biomedical information in support of patient care, education, and research. One of MLA's goals is to ensure that government biomedical information is made available to medical libraries in the most timely, accurate, and affordable manner possible.

MLA has been monitoring closely congressional activities related to reauthorization of the Paperwork Reduction Act (PRA). We commend the efforts which you, Senator Bingaman, and staff have expended to craft reauthorization legislation to better streamline the current system for management and dissemination of government information resources.

MLA has analyzed the PRA reauthorization bills proposed in both the House and Senate, and has several concerns about proposed changes which, if enacted, would severely hamper the work of medical libraries throughout the nation. We have enclosed a brief statement of these concerns which we wish to submit for the record of your Committee's hearings which were held on February 21 and 22, 1990.

Many thanks for your attention to this request.

Sincerely,

Raymond A. Palmer
Executive Director

cc: Hon. Jeff Bingaman
Edwin S. Jayne

PAPERWORK REDUCTION ACT

The Medical Library Association (MLA) is a professional organization which represents approximately 5000 individuals and institutions involved in the management and dissemination of biomedical information in support of patient care, education, and research. One of MLA's goals is to ensure that government biomedical information is made available to medical libraries throughout the nation in the most timely, accurate, and affordable manner possible. To that end, MLA has closely monitored congressional action with respect to reauthorization of the Paperwork Reduction Act (PRA), and urges special consideration in the following areas:

PRIVATIZATION

Access to government information is a public right and a principal function of government agencies. In the biomedical field more than any other, practitioners rely on accurate, timely information from health sciences libraries to ensure that appropriate treatment is given. Legislation in both the Senate (S. 1742) and the House (H.R. 3695) to reauthorize the PRA require federal agencies, when deciding upon what information to disseminate, to consider whether the information is available from a private source. MLA is concerned that the increased role of the private sector may reduce the role of government agencies, granting the private sector much more authority over government information and its pricing, and in so doing greatly reduce access to vital government biomedical information, particularly for smaller, modestly financed institutions.

Recommendation. MLA opposes the privatization of government information.

QUALITY AND INTEGRITY OF DATABASE INFORMATION

It is essential for health care practitioners, educators, and researchers to have access to the full range of information published in their particular area of concern. Progress in the biomedical field is dependent upon the currency, completeness and accuracy of information available through the National Library of Medicine (NLM) bibliographic machine-readable database, MEDLARS. While certain private firms have arrangements with NLM to repackage, customize, and resell information available through MEDLARS, NLM constructs its licensing agreements with these firms so as to ensure appropriate quality control of the database and to protect against any alteration of the information.

H.R. 3695 would prohibit NLM from entering into the licensing agreements under which it currently operates, thereby limiting its ability to exercise quality control over its databases.

Recommendation. MLA favors granting agency heads flexibility to manage government information services and oppose the transferring of this authority to the Office of Management and Budget.

COST RECOVERY

Funding provided through the appropriations process supports the costs of building and maintaining the MEDLARS databases. Computer access to the MEDLARS databases is available to domestic users for a fee based strictly on access costs. Access fees are calculated across all databases so as to provide equal access to all information, eliminating the possibility of disproportionate (and prohibitive) charges for highly specialized data.

H.R. 3695 would eliminate individual government agency control over pricing policies for dissemination of information by transferring that function to the Office of Management and Budget. In the case of the NLM this would result in the agency's inability to ensure the dissemination of vital government biomedical information at reasonable prices.

Recommendation. MLA supports retention of individual agency authority to determine pricing policies for access to government information.

PROFESSIONAL
SERVICES
COUNCIL

Representing companies
that are creating the
future through innovation,
technology and ideas

Philip A. Odeen
Chairman

Frank J. Quirk
Vice Chairman

Mark Schultz
President

March 7, 1990

The Honorable John Glenn
Chairman
Senate Committee on Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Glenn:

The Professional Services Council (PSC) is pleased to write in support of S. 1742, the Federal Information Resources Management Act ("Act"), and, more particularly, in support of the importance it assigns to improving the federal statistical system.

PSC has long been a staunch supporter of improvement in statistical data, especially in economic statistics pertaining to the professional and technical services industry. Over the last decade, the industry has grown dramatically. By its innovative and creative contributions to the U.S. economy, the industry also is enhancing our nation's competitive position in the world economy. However, the professional and technical services industry has been handicapped by the absence of basic economic data about itself.

In response to this lack of industry data, PSC has been involved actively in a number of initiatives directed to improving data sources on the professional and technical services industry. Recognizing the importance of the Standard Industrial Classification (SIC), which defines the industry groups by which statistical data are analyzed, PSC has worked diligently to foster improvement in the SIC and to expand and refine those codes pertaining to professional and technical services. We also have sought to encourage research on our industry and to raise the awareness of policymakers about the inadequacy of existing data sources. We consistently have urged the improvement of data quality and the maintenance of integrity and continuity in the federal statistical system. PSC has made this commitment in the belief that only with adequate data can we accurately chart our course in an increasingly complex and competitive world.

We also are pleased particularly with the multi-year initiative to improve the quality of economic statistics recently announced by

World Center, 918 16th Street, N.W., Suite 406, Washington, D.C. 20006, Phone: 202/296-2030, Fax: 202/296-2035

Council of Economic Advisers Chairman Michael J. Boskin. The Boskin initiative recognizes the increasingly important role of professional and technical services firms in the economy and the critical need to improve how government measures this sector. PSC views the actions of both the executive and legislative branches, embodied by the Boskin initiative and the consideration of the Act, as excellent steps toward improving our federal statistical data.

We believe that the Act would help to restore to the federal statistical system the central importance that it is due. We believe that the Act would help to foster the long-range planning and coordination of statistical policy that for so long has been lacking. The bill quite rightly gives visibility and prestige to statistical activities through its proposed interagency statistical policy working group, its external Advisory Committee on Statistical Policy, and the Commission on Federal Information.

Perhaps most importantly, the Act would allow for the necessary distinction between "paperwork reduction" and data collection for statistical or research purposes. Too often in the past, statistical data collection has been equated with regulatory paperwork and, hence, has been regarded as something to be restricted or eliminated. While PSC endorses initiatives to reduce the immense paperwork burden associated with federal procurement, we believe that paperwork reduction can be accomplished without shortchanging our statistical base.

Finally, we must address the problem of inadequate resources to implement reform of the statistical system. As you are well aware, the past decade has witnessed an erosion of the quality and coverage of economic and demographic statistics. A major cause of this erosion has been a lack of adequate funding for federal statistical activities. Although the statistical agencies have tried to maintain high standards of quality, the fact remains that, for the most part, they have had to make do with fewer and fewer resources. The statistical Policy Branch within the Office of Information and Regulatory Affairs (OIRA), which is charged with applying the current Paperwork Reduction Act to statistical data collection, similarly has suffered from inadequate resources to accomplish its mission.

This paucity of funds for statistical activities strikes us as being "penny wise and pound foolish." Since many of our nation's economic policies, as well as decisions about the allocation of national resources, are predicated, in part, on federal statistical data, it is in the public interest to ensure that those data are of the highest possible quality and reliability. This is especially true in a time of dramatic change and concern about U.S. competitiveness and productivity. New tools may be necessary to measure the effectiveness of policy and resource allocation in areas as diverse as education, the environment, and drug control. A relatively small investment in an improved statistical base would help ensure that the rest of our budget resources are allocated and expended wisely.

Thank you for this opportunity to comment on this vital legislation.

Sincerely,

Mark Schultz
President

cc: The Honorable Jeff Bingaman

AMERICAN
INSTITUTE OF
AERONAUTICS AND
ASTRONAUTICS

TECHNICAL
INFORMATION SERVICE
555 WEST 57th STREET
NEW YORK, N.Y. 10019
212/247-6500

February 15, 1990

The Honorable John Glenn
United States Senate
Washington, DC 20510

Dear Senator Glenn:

I am writing to urge your active support for the bill S1742, Federal Information Resources Management Act of 1989, which comes before your committee on Governmental Affairs for hearings on February 21 and 22. Although I will not be able to attend these hearings, I will be submitting testimony for the record.

As an Honorary Member of the American Institute of Aeronautics and Astronautics (AIAA), the non-profit professional society of 44,000 aerospace engineers and scientists, you may be aware of the role of AIAA's Technical Information Service. For 28 years Technical Information Service has had a partnership with NASA to provide the aerospace community with abstracts of the world's published scientific and technical literature in this field. Just recently, in fact, the program published its one-millionth abstract. Available in both written and electronic form, this information makes available to engineers and scientists the knowledge developed around the world to assist them in research and development. Needless to say, this activity is of great benefit to the government, which invests so heavily in civil and military aerospace programs.

It is from this perspective that we support senate efforts to update and upgrade the Federal Information Resources Management process. We believe that the Senate approach, which leaves the agencies with the primary responsibility for managing information resources, is critical.

Our testimony will focus on the dissemination functions. While we support the requirements for information dissemination, we hope that legislators will be aware of the positive role that the private sector can play in enhancing this process.

We are also concerned about the special needs for managing scientific and technical information.

We urge you and the members of the Governmental Affairs Committee to stand by the approach to Federal Information Resources Management in S1742. The House approach, while addressing the same goals, is significantly different, and we believe, detrimental to achieving these goals.

Thank you for your attention into this important matter.

Sincerely,

Barbara Lawrence

Barbara Lawrence
Administrator -
Technical Information Service

cc: Dr. Leonard Weiss
Government Affairs Committee

AMERICAN
INSTITUTE OF
AERONAUTICS AND
ASTRONAUTICS

TECHNICAL
INFORMATION SERVICE
555 WEST 57th STREET
NEW YORK, N.Y. 10019
212/247-6500

March 8, 1990

The Honorable John Glenn
United States Senate
Washington, DC 20510

Dear Senator Glenn:

I am pleased to provide this testimony for the record regarding S1742, the Federal Information Resources Management Act of 1989, which is now before your committee on Governmental Affairs.

The American Institute of Aeronautics and Astronautics supports S1742 as a means to address a long-standing deficiency in the U.S., the lack of a federal information policy.

We are particularly concerned with the dissemination and use of scientific and technical information and with the quality and consistency of the information and information services.

We urge your support for the concepts and the strategy of S1742.

Sincerely,

Barbara Lawrence

Barbara Lawrence
Administrator -
Technical Information Service

cc: Senator Jeff Bingaman
Dr. Leonard Weiss
Mr. Ed Jayne

STATEMENT OF
BARBARA LAWRENCE
ADMINISTRATOR
TECHNICAL INFORMATION SERVICE
AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS
NEW YORK, NEW YORK
TO THE U.S. SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
MARCH 7, 1990

I am pleased to have this opportunity to share the views of one professional society and one information professional on the very important bill before this committee, S1742, the Federal Information Resources Management Act of 1989. This bill addresses the matter of updating the federal information infrastructure and, even more importantly, the value of that infrastructure. This is no trivial matter in a world where other nations have taken better advantage of our information than we have and, in addition, have enhanced their own information resources, all to their advantage. Competitiveness needs to be more than a buzzword; this Act takes the term seriously.

This Act has the objectives of maximizing the public benefit through provision of quality government information and information services. My comments reflect my expertise and interest in scientific and technical information (STI), information dissemination, and public-private sector cooperation to achieve these objectives.

The American Institute of Aeronautics and Astronautics (AIAA) is a non-profit professional society of 44,000 aerospace scientists and engineers. For 28 years the Institute's Technical Information Service has had a cost-sharing partnership with NASA to provide the aerospace community with abstracts of the world's published scientific and technical literature in this field. Just recently, in fact, the program published its one-millionth abstract. Available in both print and electronic form, these information products make available to U.S. engineers and scientists the knowledge developed around the world to assist them in research and development (R&D). Needless to say, this activity is of great benefit to the government, which is the largest R&D spender, especially in aerospace.

The significance of this Act is that it: addresses a critical national problem; creates a participatory strategy to effectively achieve its goals; does not lose sight of the need to ensure quality; recognizes the positive role the private sector, as users and as partners, can play; and understands the difference between the tools (technology), the information, and the system.

I would encourage this committee do two things: first to take specific note of STI, which is sometimes a beast of a different color, and second, to stick to the sound strategy of this bill in designing final legislation.

My more specific comments are organized according to the sections of S1742. I am of course qualified to address only limited aspects of the Act.

Section101. Purposes, p4

Of the several purposes of this act, "ensuring the greatest possible public benefit," "emphasizing information resources management (IRM) as a comprehensive and integrated process" and "improving the quality and use of Federal information" are paramount. We have often managed Federal information for lowest cost or made decisions in a vacuum. Information resources are critical to determining this nation's competiveness in the 21st century.

Section102. Definitions, p7-8

A key aspect of this bill is that the definitions of "information resources", "information resources management", and "information systems", reflect a meaningful understanding of information, with a focus on content and complete systems, not just technology. This distinction may seem self-evident to some, but as a scientist turned information scientist, I see that all too often the tools take precedence over understanding what information is needed by whom to do what job.

Section104. Authority and Functions of Administrator

Sec.104(a)General, p11-12, requires that the Administrator develop information policy in coordination with agencies and through the establishment of interagency working groups.

It is significant that the drafters of this Act understood that agencies and users face a variety of circumstances, and that there are many information disseminaton programs in place already. This is especially true in the science agencies, many of who's mission include a dissemination. Thus we wholeheartedly support this participative approach.

We do urge urge that one interagency working group be concerned with STI. There are real differences between R&D information and administrative or business information. The scientific process builds on prior work and is in a sense regenerative. The cycle of information creation, use, and finally, new creation requires specialized IRM strategies. The challenges for STI managers include: conflicting demands of open access versus sensitive technology; opportunities of the National Electronic Highway; the need for multidisciplinary information; and the need for a science-literate public capable of understanding (and making) policy on topics such as global change or space nuclear power. We also urge that this interagency group be connected with the Office of Science and Technology Policy (OSTP), which was assigned a role in managing and dissemination of STI in the National Science and Technology Policy Organzation and Priorities Act of 1976.

Support for this approach comes from the Technical

Information Technical Committee of the AIAA. This Technical Committee has found that the government STI system "has been compromised by largely uncoordinated changes in the system during the past two decades. ... Inadvertently, barriers to access by the audience for which the information has been generated have resulted." These changes, which were motivated by factors such as budget restrictions, security considerations, or perceived technological opportunities, were not made in the context of any federal information policy or, often, in consultation with users. If S1742 can be adjusted to specifically address STI, we can finally benefit from a coordinated information policy in the U.S.

Sec.104(e) Information Dissemination Functions
This is the section of most direct interest from AIAA's viewpoint. There are two aspects of Sec.104 that are worth noting. First, it acknowledges that "a public and private sector sharing of responsibilty is sound public policy".

As mentioned above, AIAA and NASA have a cost-sharing partnership which began in the early sixties. At that time, AIAA was publishing International Aerospace Abstracts and operating the AIAA Library. NASA, to avoid duplication and competition with the private sector, approached AIAA and together we created a comprehensive worldwide service for the entire aerospace STI user community. AIAA's added-value contributions to this partnership include investment in product development and dissemination, its technical publications, and access to its membership to promote the understanding and use of aerospace STI resources. Thus, NASA is provided with a gateway to the aerospace community and NASA information is disseminated to a broader using public than NASA could otherwise address. And in return NASA's information program is enhanced with input from the scientists and engineers that are the technological core of the aerospace community. This is one example of how maintaining a diversity of public and private products and services contributes to your objectives.

Although AIAA is non-profit, we are motivated to maintain this partnership by several factors. Our shared information transfer mission is one. The other is that our arrangement with NASA gives AIAA certain rights and ensures that our name as well as NASA's is associated with the service. Cooperative efforts should provide some protection for the private sector, within the guidelines that this Act is meant to create. This protection is one way to ensure the kind of quality of which AIAA is so proud.

The second aspect of Sec.104(e) that I want to support is that agencies maintain an "affirmative role" and responsibility for the dissemination of government information. This is important, as is the proviso (Sec.104(e)(3)(D),p18-19) that applies what I would call business sense or common sense in the making of agency decisions regarding information dissemination.

Section106.Federal Agency Responsibilities

Sec.106.(10)(A)p23-24. addresses agency responsibilities and provides that the dissemination of agency public information products and services be timely, equitable, and be conducted in an "efficient, effective, and economical manner." My comments regarding Sec.104 can be applied to this Sec. as well. Participatory processes and cooperative efforts should be seen to contribute to the effective use of federal information.

Section108. Federal Information Locator System (FILS), p37-39

Although this concept is new to me, I would like to point out that one system, however well designed, will not solve all problems for federal information access. A tool such as FILS will be of great value as a starting point. I hope that contemporary concepts of distributed processing will be used, although for the user there should be the appearance of a single access point. You should be aware that some federal STI is published in the private sector, not within government documents. Scientists publish their work in journals, conference proceedings, and books. This is part of the scientific process.

Section111. Consulation and Advisory Committees

There are many interested and qualified parties who will welcome the opportunity to serve on an Advisory Committee. May I suggest that the National Federation of Abstracting and Information Services (NFAIS) be considered to represent the perspective of secondary information services. NFAIS represents over 70 member organizations who organize and publish databases for access to and dissemination of information. Some are non-profit, others are for-profit or government. Collectively they are a knowledgeable and expert group of information providers and information users.

TITLE II Commission on Federal Information
To be consistent, I request that you consider having this commission investigate not only information generally, and statistical information in particular, but also address STI specifically. STI is both the result and the starting point of R&D, and the federal government provides the majority of funds for R&D in the U.S. (several recent OTA studies provide background). We do have an infrastructure and tradition, but these do need attention. The European Community and Japan are placing significant resources in strengthening their information infrastructure. Let us do the same.

Finally, I commend the Governmental Affairs Committee and its subcommittee on Government Information and Regulation for crafting legislation to address a difficult and important problem in a progressive and intelligent manner.

Please call on me if I can be of any further assistance in answering any questions.

COUNCIL FOR
CITIZENS AGAINST
GOVERNMENT WASTE
1511 K Street, N.W., Suite 643, Washington, D.C. 20005, 202-628-6428

THE PAPERWORK REDUCTION ACT

STATEMENT OF ALAN L. KEYES
PRESIDENT
COUNCIL FOR CITIZENS AGAINST GOVERNMENT WASTE
BEFORE THE SENATE COMMITTEE ON
GOVERNMENTAL AFFAIRS
FEBRUARY 22, 1990

Mr. Chairman and members of the Committee, I appreciate this opportunity to present the position of the Council For Citizens Against Government Waste (CCAGW) on the reauthorization of the Paperwork Reduction Act and the Office of Information and Regulatory Affairs (OIRA). CCAGW is a grass roots lobbying organization committed to encouraging legislation that reduces government waste and increases the efficiency of government operations. We have 350,000 members who are dedicated to reducing the budget deficit and fighting waste in the federal government.

The Paperwork Reduction Act and OIRA should be preserved and strengthened in order to minimize federal paperwork burdens. Statistics from the Office of Management and Budget (OMB) demonstrate the burdens of complying with red tape and paperwork in the federal government. According to their estimates, 6.2 billion work hours is spent on paperwork each year simply for information collection requirements, with close to 5 billion of these work hours spent at the Internal Revenue Service (IRS) alone. That's over 7% of our gross national product going towards filing and storing Federal forms! Nearly $330 billion is wasted each year just to process paper and comply with requirements for information.

This over-regulation and intrusion into private enterprise represents government waste because it reduces productivity and increases business costs that are eventually passed along to the consumer. It is also an inefficient use of government resources to process and maintain unnecessary and duplicative federal paperwork.

The Paperwork Reduction Act and OIRA currently improve management of government information. By acting as an oversight agency for federal paperwork requirements, OIRA protects the public from unreasonable or unnecessary paperwork and keeps government expenses from overregulation in check.

OIRA leads the charge in this effort by providing policy guidance to agencies for information activities, not by running programs. The Paperwork Reduction Act must be managed in a coordinated and systematic manner based on established principles of information resources management so that both the public and the federal government are well served.

CCAGW urges you to reauthorize the Paperwork Reduction Act and strengthen OIRA so that the burden to the public is reduced and the efficiency of federal paperwork and information collection is improved.

STATEMENT BY DAVID O. STEPHENS, CRM
PRESIDENT AND CHIEF EXECUTIVE OFFICER

AND

DOUGLAS P. ALLEN, CRM
U.S. LEGISLATIVE AND REGULATORY AFFAIRS CHAIRMAN

OF THE

ASSOCIATION OF RECORDS MANAGERS AND ADMINISTRATORS

BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

REGARDING S.1742

THE FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

February 21 and 22, 1990

Mr. Chairman, Members of the Senate Governmental Affairs Committee:

Thank you for this opportunity to express our views with regard to S.1742, the proposed Federal Information Resources Management Act. The Association of Records Managers and Administrators (ARMA International) has been involved with the issue of paperwork reduction since 1977. We hope that you will find our comments to be helpful in your deliberations.

Let us tell you about our Association so that you will know the reasons for our deep interest in the Paperwork Reduction Act. ARMA International is a professional association of more than 10,000 members world-wide. The vast majority of our members are located in the United States. They come from a variety of backgrounds, and include Records Managers in small businesses, large businesses, local government, state governments and federal agencies. Our members also come from educational institutions and other not-for-profit organizations. ARMA members are face-to-face with paperwork problems on a daily basis.

Our members build and manage records centers for their organizations. These records storage facilities often contain hundreds of thousands of cubic feet of records. Most often they are retained for statutory or regulatory requirements and no longer serve a useful purpose for the organizations themselves.

Our members also design and implement the sophisticated recordkeeping systems which are needed for the efficient operation of our nation's offices. Optical Disk systems, advanced microfilm systems, and automated paper filing systems are the tools of our trade with regard to the management of active records.

ARMA members know that we are figuratively drowning in a sea of increased paperwork, despite the advances in technology. For example, we are well aware that the total production of file folders for the storage of paperwork has grown from 114,000 tons in 1980 to 240,000 tons in 1990. The increase which we have witnessed between 1985 and 1990 alone has been 75,000 tons. That five-year increase is almost double the entire production of file folder stock which occurred during 1960. To be quite blunt, ARMA members know that we have too much paperwork!

In an effort to minimize the costs which our organizations bear for keeping this paperwork, Records Managers provide their organizations with the best advice available on the operational, financial, and legal needs for retaining records. ARMA members research the federal and state statutes and regulations in an attempt to locate, and to apply, all of the appropriate agency retention requirements.

That task is often made more difficult by the propensity of federal and state agencies to require that an organization retain a record, without specifying an appropriate time period for such retention. From a practical standpoint, that often requires our organizations to retain records on a more or less permanent basis.

Due to our daily involvement with the nation's paperwork problem, ARMA became interested in the legislative aspects of that problem. In 1977, we invited Congressman Frank Horton to speak to our National Conference in Houston, Texas, about the report of the Federal Commission on Paperwork. When the Congress began to consider the adoption of a Paperwork Reduction Act in 1979 and 1980, we supported the concept vigorously. Since that time, we have pursued the Paperwork Reduction initiative at the state level in an effort to bring the paperwork burden imposed by state agencies under better control. We are pleased to report that progress is being made in that area.

When S.1742 was introduced, ARMA members analyzed it in detail to determine its impact on ARMA members and on their organizations. We also looked quite closely at the criticism that has been leveled against the implementation of the Paperwork Reduction Act. As many of you know, ARMA voiced its concerns about S.1742 early. Our chapters, as well as many individual members throughout the nation, asked that S.1742 be substantially revised or rejected. We renew that request now.

ARMA International asks that the Senate Governmental Affairs Committee address a number of key concerns which we have with S.1742. Further, we ask that you consider the attached ARMA "Paperwork Reduction and Management Improvement Act of 1990" as an alternative to S.1742. Our key concerns, and the problems which should be remedied in S.1742, include the following:

1. An unfortunate de-emphasis of the effort to reduce the paperwork burden which the federal government places on the American public.

2. The proposed "Agency Self Certification" as it is described in Section 107.

3. The effective removal of the oversight function of the Office of Information and Regulatory Affairs with regard to information collections and the imposition of paperwork burdens.

4. The actual reduction in the public's access to, and hence the accountability of, the Office of Information and Regulatory Affairs.

5. The elimination of confidentiality with regard to complaints which the public may voice to OIRA.

6. The failure to provide OIRA with sufficient budgetary resources for the completion of its tasks.

We are particularly concerned with the fact that S.1742 removes "Paperwork Reduction" from what has been known as the "Paperwork Reduction Act." ARMA is concerned with the de-emphasis of efforts to reduce, or at least to control, the growth of paperwork. The practical effect of Section 3507, Subsection (a)(3), would be to require that OIRA place less emphasis on the effort to reduce the paperwork burden. Based upon the continued "information explosion," ARMA members believe that such a de-emphasis would be a major step backward. Certainly we are pleased to see that federal agencies are charged with more responsibility for assuring that each information collection meets the tests of necessity and practical utility, under Section 3506. However, that effort requires oversight, as we shall point out later.

With regard to the envisioned "Self Certification" by agencies, we do not believe that it will work well as written. Although we might all hope that a "sufficiently independent" senior official of an agency might be so positioned as to be effective in combating excessive or poorly designed information collections, we see no statutory provisions that would _ensure_ the _true independence_ of such an official.

S.1742 does not make these individuals accountable to anyone other than their own management. For such an official to be truly independent, he or she would need to have the same stature within an agency as would the Agency's Inspector General. S.1742 makes no provision to ensure such independence. If we had ever been able to rely upon the regulators to regulate themselves, then no Paperwork Reduction Act would have been needed in 1980, no Federal Paperwork Commission report would have been necessary in 1977, and the original Federal Reports Act would not have been called for in 1942.

Through the process of agency "self-certification," Section 3507 removes OIRA from having any effective oversight role. Only if OIRA can demonstrate that an agency has acted in an "arbitrary and capricious" manner would it be allowed to step in. ARMA believes that such a restriction would remove any semblance of oversight.

That oversight is important to us, to the private sector, to state and local governments, because it gives us a neutral third party to whom we can voice our complaints and objections. OIRA provides the "checks and balances" which our members need in order to receive a fair and impartial hearing when an agency places overly burdensome requirements on the American public. OIRA also provides all of us with a single focal point for our objections. Organizations such as ARMA need a single point of contact with which we can deal. The same may be said of the small business community. Small businessmen are not intimately familiar with the myriad of federal agencies, nor are they thoroughly familiar with the Federal Register. But when they are able to work with an entity such as the Office of Information and Regulatory Affairs, such lack of familiarity ceases to be a barrier to the exercise of citizens' rights.

Today, individual citizens, small groups or associations, small businesses, large businesses, state and local governments, and other not-for-profit organizations, can deal directly with OIRA's Desk Officers.

The ability to do so under current law provides needed and direct public access and accountability. Sadly, S.1742 bars public access to the Desk Officers. Under Section 3518, Subsection (b)(5), "only the Administrator and the Deputy Administrator of the Office of Information and Regulatory Affairs may communicate with any person who is not employed by the Federal Government on regulations submitted to such office for review." That provision can only render OIRA less accountable and less accessible than it is under current law.

Not only would OIRA become less accessible, but the confidentiality of communications with OIRA would also be seriously jeopardized under S.1742. ARMA members include a large contingent of government contractors. Imagine the quandary of an employee of a contractor who saw a need to object to an agency information collection, desired to complain to OIRA, but who did not wish to harm his or her organization's business relationship with the Agency. Today, when "bootleg" (non-OMB approved) information collections are detected, that person can register a complaint with some degree of anonymity. Under the provisions of S.1742, no such protection would be in place.

Finally, the failure to provide OIRA with sufficient budgetary resources for the accomplishment of its work is a serious deficiency of S.1742. The task of pursuing the development of government-wide Information Resources Management policies and practices is not an inexpensive one. Many businesses among the "Fortune 100" spend significantly more than $6,000,000 annually in an effort to accomplish the same task. ARMA believes that OIRA cannot hope to achieve any measurable degree of success in the Information Resources Management area with such limited budgetary resources as are being proposed.

If the above detailed problems with S.1742 were remedied, ARMA could support the bill. We are quite pleased to see the effort to have agencies do more towards controlling paperwork burdens. Further, we are pleased with the potential benefits which a Commission on Federal Information might have for all agencies and for all taxpayers. Finally, we are pleased to see the inclusion of the discipline of Records Management as a true Information Management discipline. We agree with the premise that too many agencies view Information Resources Management as limited to the disciplines in the data processing arena.

In reviewing S.1742, ARMA members came to the conclusion that section-by-section amendments would not be especially practical. Therefore, after the Congressional recess in November of 1989, we set out to draft language which would accomplish the objective of providing for a continuing emphasis on paperwork reduction, and which would meet the needs of all sectors of our society. The attached "Paperwork Reduction and Management Improvement Act of 1990" is the direct result of those efforts. We offer the draft for the consideration of the Committee members, and would be pleased to meet with you in an effort to improve upon this draft.

Barring the adoption of the ARMA draft as a substitute, however, ARMA would welcome the introduction and passage by the Congress of a reauthorization of OIRA under current law. ARMA members support the existence of a strong OIRA and recognize the need for a strong Paperwork Reduction Act.

We urge the members of this Committee to "save the Paperwork Reduction Act" by (1) rejecting S.1742, (2) substantially altering S.1742 as suggested above, (3) adopting ARMA's proposed "Paperwork Reduction and Management Improvement Act of 1990," or (4) reauthorizing OIRA without substantial changes.

Thank you, Mr. Chairman and Members of this Committee, for the opportunity to express our views on S.1742. We stand ready to work with members of the Committee or with the appropriate staff groups to ensure that the end product of this effort is "good law."

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Executive Director
James P. Souders

MEMORANDUM

TO: Interested Parties

FROM: Douglas P. Allen, CRM
ARMA International, U.S. Legislative and Regulatory Affairs Chairman

RE: Paperwork Reduction and Management Improvement Act of 1990

DATE: February 1, 1990

Attached is a copy of a draft bill to reauthorize the Paperwork Reduction Act. This draft bill was developed by ARMA International with the assistance of a number of interested groups who are dedicated to strengthening the Paperwork Reduction Act and to the improvement of Information Resources Management within the Federal Government. At this time, the bill has not been sponsored by a United States Senator; but it could readily serve as a substitute for Senate 1742.

In drafting the bill, ARMA International's U.S. Legislative and Regulatory Affairs Committee has focused upon retaining the valuable aspects of current law with regard to paperwork reduction. Further, we have focused on a number of specific problem areas which are in need of an increased level of attention. Those areas include:
the paperwork burdens placed upon small businesses by the Federal Government, the burdens placed upon business and ultimately upon ever taxpayer in the procurement process, the need for improvements in the manner in which Federal agencies manage their information resources, and the need for an approach to IRM which extends beyond data processing.

ARMA intends to pursue sponsorship of this measure, and seeks the assistance of other concerned groups. Based upon the experience of ARMA International, we believe that this bill represents the best opportunity for improved paperwork reduction legislation. We welcome comments by all concerned groups, and are very appreciative of all of the input which has been received to date.

PAPERWORK REDUCTION AND MANAGEMENT IMPROVEMENT ACT OF 1990

SECTION-BY-SECTION ANALYSIS

GENERAL OVERVIEW

The "Paperwork Reduction and Management Improvement Act of 1990" has been written to strengthen the current Paperwork Reduction Act and to improve the Federal Government's use of Information Resources. The Act has been divided into five key titles, as follows:

1. TITLE I - This major title of the Act deals with the collection and sharing of information by Federal agencies. It focuses on the minimization of the paperwork burden, especially for small businesses and for those involved in the procurement process. It provides for the preservation of authority of the Director of OMB and sets forth a greatly improved mechanism for internal review of information collections and paperwork burden by Federal agencies. Further, this title encourages agency heads to ensure that a diversity of public and private information products and services are available for the public. This title sets forth the procedures for information collection reviews, and provides for such reviews every three years for each information collection. For the protection of the public health and safety, this title provides a means by which agencies may secure an emergency clearance for an information collection. Finally, for the first time in any proposed legislation, this Act provides OIRA with adequate resources to accomplish its assigned tasks.

2. TITLE II - This title provides for the establishment of a Commission on Federal Information Resources Management. The Commission's purposes and functions include: the study of existing statutes, policies, rules, regulations, procedures and practices of the Federal Government relating to the gathering, processing, maintenance, use, disclosure, and sharing of information and the imposition of recordkeeping requirements. The focus of this study includes the effect of existing statutes on small businesses and on state and local governments. The Commission's membership is specified to include members from the Senate, House, OMB, Comptroller General, NARA, and the private sector.

3. TITLE III - Title III provides for a review of each bill or joint resolution of the regulatory impact which would be incurred in carrying out the bill or joint resolution. Factors to be included in the review are: the number of individuals and businesses impacted, the economic impact of such regulation on individuals, consumers, and businesses, a determination of the impact on personal privacy and a determination of the amount of additional paperwork and recordkeeping that will result from the regulations to be promulgated.

4. TITLE IV - This title provides for the reduction of paperwork in the procurement process. If focuses on commercially available products and directs the Office of Federal Procurement Policy formulate, and the Federal Acquisition Regulatory Council to promulgate simplified contracts. Further, it sets forth a more efficient means of conducting contract negotiations with offerors of commercially available products. OIRA is assigned the responsibility of reviewing the paperwork requirements associated with the promulgation of the new regulations.

5. TITLE V - Title V recognizes the need for improvements in the management of public records. It provides for amendments to Section 3302 of title 44, United States Code with regard to the development of standards for Federal agencies to use in interpreting the definition of records. Other sections of title 44 are modified to ensure that records may be examined for historical preservation.

DETAILED ANALYSIS -

TITLE I:

SEC. 101. This section provides the findings and purposes which are the basis of the bill. The findings include statements which indicate a realization that information collections and the imposition of paperwork and recordkeeping requirements pose a substantial burden upon the public, especially with respect to small business and procurement. The findings go further in the recognition of the requirement to curb the growth of such burden. The importance of public information and the need for central management authority are detailed as well.

SEC. 102. A number of terms are defined within this section, and definitions under current law are modified, or further detailed.

SEC. 103. This section deals with the authority of the Director of OMB with respect to: paperwork control functions, statistical policy and coordination functions, privacy functions, and information sharing functions.

SEC. 104. The authority of OMB's Office of Information and Regulatory Affairs with regard to the review of paperwork burdens of agency programs is detailed in this section. The Director of OMB is charged with the responsibility of pursuing the goal of reducing the paperwork and recordkeeping burden on all persons, especially on small businesses and Federal contractors. Currently approved information collections are to be reviewed by OIRA every 3 years.

SEC. 105. This section details the increased responsibilities which Federal agencies must bear in efforts to reduce the paperwork burden. Agencies are directed to provide thorough reviews of information collection requests and of paperwork burden. Such review is to take place prior to submission of a request to OMB. Specific requirements, including that of "practical utility" are included in this section. Agencies are charged with a responsibility to review each currently approved information collection once every 3 years.

SEC. 106. Specific procedures for the review of Information Collection requests by the Director of OMB are detailed in this section. Included in that review are the steps which the agency has taken, pursuant to Section 105 to ensure that any paperwork or recordkeeping requirement has been minimized.

The Director's authority to deal with Information Collections which are contained within a proposed rule has been preserved by this section. Emergency clearance of Information Collection Requests have been preserved as well to ensure the public health and safety.

SEC. 107. The Federal Information Locator System is dealt with in this section. The FILS system is to serve as a comprehensive inventory and authoritative register of all information collection requests by or for the Federal Government. The Act requires that the optimal composition of the system be determined by the Director and by other interested agencies.

SEC. 108. This section establishes the Advisory Committee on Statistical policy in order to fulfill the Act's goals of improving the nation's statistical system. The Committee's structure is defined to include at least 20 members, and ensures that the committee is fairly balanced with respect to the points of view represented by the statistics-user and statistics-provider communities.

SEC. 109. Section 3519 of title 44, United States Code is modified to add an annual review of OIRA by the Comptroller General, and the submission of a report to Congress regarding the performance of OMB with regard to the goals set forth within this Act.

SEC. 110. Provides a number of technical and conforming amendments to Sections 3509, 3513, and 3514 of title 44 United States Code.

SEC. 111. This section provides for increased levels of funding for OIRA. Funding is scheduled to increase from a level of $ 6,500,000 in 1991 to $ 8,500,000 for fiscal year 1995. Such funding increases are absolutely essential if OIRA is to deal effectively with the issues of paperwork reduction and information resources management.

TITLE II:

SEC. 201. Provides the Congressional findings upon which the establishment of the Information Resources Management Commission is based. These findings include: the need for the integration of information management resources with regard to the collection, imposition of recordkeeping requirements, processing, maintenance, use, disclosure, and sharing of data. The findings also include the need for improvements in the quality and nature of the Federal information and statistical data system, the need for the efficient use of all information management technologies and disciplines, and that a renewed effort is required to assure that the Federal Government minimizes the burden of information collection, disclosure, and recordkeeping.

SEC. 202. To accomplish the purposes of the Commission, Section 202 formally establishes the Commission on Federal Information Resources Management.

SEC. 203. This section details the functions of the Commission which include: a study and investigation of the current statutory, regulatory and procedural environment relating to information collections, the use of such collections, and the management and control of these information activities. The Commission is charged with a responsibility to consider ways of improving information resources management, ways of improving the quality of information and statistical data systems, ways of improving the sharing of information and statistical data, such other matters as the Commission may decide which affect the collection of information and the imposition of recordkeeping requirements by or for the Federal Government, and information resources management. The Commission is instructed to provide its final report within 4 years after the date of the first meeting of the Commission. Further, OMB, in coordination with the executive agencies are directed to take action to carry out the recommendations of the Commission, and to propose legislation needed to carry out or to provide authority to carry out other recommendations of the Commission in which they concur. OMB is to report to the Congress on its progress in implementing the recommendations at least once every 6 months.

SEC. 204. This section provides for a detailed breakdown of the membership of the Commission. The Commission is determined to be comprised of 15 members including: 2 members of the Senate (from different parties), 2 members of the House of Representatives, the Director of OMB, one other official or employee of the executive branch of the Federal Government, the Comptroller General, 1 representative from the National Archives and Records Administration, 2 members from state and local governments, and 5 members from varying information management backgrounds in the private sector. Those persons are to include representation from small business, labor and other interested groups.

SEC. 205. This section deals with the compensation of members of the Commission.

SEC. 206. Provides for the powers of the Commission, including subpoena powers

SEC. 207. Federal Agencies are authorized to furnish data and information for the use of the Commission.

SEC. 208. Terminates the Commission 120 days after the submission of the final report provided for in section 203.

SEC. 209. Authorizes the appropriation of the funds necessary for the Commission to carry out the provisions of Title II of this Act.

TITLE III:

SEC. 301. Provides for the public evaluation of Congressional actions by amending Rule XI of the Rules of the House of Representatives. A new clause is added to provide for the evaluation of the regulatory impact of a bill or of a joint resolution. The determination of those affected, the determination of the economic impact, the determination of the impact on personal privacy, and the determination of the amount of additional paperwork and recordkeeping that will result from the regulations promulgated as a direct result of the bill or joint resolution are to be provided.

SEC. 302. Mandates the use of FTS2000 by Federal Agencies.

TITLE IV:

SEC. 401. Defines a number of terms relating to the procurement of commercially available products in the procurement process.

SEC. 402. Charges OFPP with a number of responsibilities in an effort to reduce the paperwork required with regard to the procurement of commercially available products. Chief among these responsibilities is the formulation of a new regulation which provides for simplified contract language for such items.

SEC. 403. Requires that OIRA review the paperwork requirements of the new regulation within 6 months of their promulgation, to report its findings and recommendations to the Office of Federal Procurement Policy, to the House Committee on Government Operations and to the Senate Committee on Governmental Affairs.

TITLE V:

SEC. 501. Provides for binding regulations concerning public records by amending section 3302 of title 44, United States Code. Further, this section provides for the examination of records for historical preservation, and provides for the promulgation of regulations to provide for the inspection of records, the use of which is restricted by law.

SEC. 502. Modifies Section 552a(t) of title 5, United States Code.

FACT SHEET

THE PAPERWORK REDUCTION AND MANAGEMENT IMPROVEMENT ACT OF 1989

MAJOR THEMES

1. To reauthorize the Paperwork Reduction Act with emphasis on the original intent and purpose and to increase efforts to reduce duplicative or unnecessary Federal information collection and to minimize the paperwork burden on the public. Special emphasis is given to efforts to be undertaken to reduce the paperwork burden on small business.

2. To strengthen the information infrastructure and statistical database of the Federal government, including improving agency capabilities and the sharing of government information.

3. To set a national information resources management policy, which serves to integrate all information management disciplines within a lifecycle management system within the Federal agencies.

4. To improve the ability of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in carrying out all its responsibilities under this law.

KEY PROVISIONS

1. STRENGTHENS PAPERWORK REDUCTION EFFORTS

The importance of a strong and ongoing government-wide effort to reduce the burden of unnecessary government paperwork cannot be overstated. A renewed and unified effort by the Congress, the Executive Branch, and Federal agencies is required to attack the mountain of paperwork faced by businesses, particularly small businesses and those involved with the Federal procurement process, state and local governments, university researchers, and individuals. The "Paperwork Reduction and Management Improvement Act of 1990" reflects a pro-active approach towards addressing this important problem.

* Reauthorizes existing Federal information collection provisions of law.

* Continues the goal of reducing paperwork, and places emphasis on reducing the burden imposed upon small businesses.

- Requires Federal agencies to increase their efforts to reduce the paperwork burden through improved internal reviews of information collection requests and of paperwork burden.

- Provides for continued oversight by the Executive Branch, through OIRA of agency efforts to reduce the paperwork burden.

- Continues to provide all parties affected by such proposed information collections to challenge their need, adequacy, and burden estimate through the Office of Management and Budget's Office of Information and Regulatory Affairs.

- Continues to provide for any emergency clearance of an information collection request which may be required by a Federal agency.

2. IMPROVES INFORMATION RESOURCES MANAGEMENT

The Federal Government's information resources must be made a high priority as a valuable and useful resource to government and society. As such, it must be managed in a coordinated and systematic manner based upon established principles of information resources management. OIRA, in conjunction with other government entities with centralized information management responsibilities, must take leadership in developing coherent information policy which gives balanced and needed emphasis to all information functions and to all information management disciplines. Federal agencies must establish parallel, but independent, information resources management programs.

- Emphasizes the need to make use of all information management disciplines, and emphasizes the need to view information resources as more than data processing technology alone.

- Provides the OIRA Administrator with the budgetary resources necessary to address information resource management issues within Federal agencies.

- Strengthens OIRA's ability to deal with statistical policy, privacy, and information technology issues.
- Re-emphasize the Federal Information Locator System (FILS) to enable agencies to make better use of existing Federal Government information resources.
- Establishes an Advisory Committee on Statistical Policy to improve the coordination of our Federal Government's statistical system.

3. ESTABLISHES A COMMISSION ON FEDERAL INFORMATION RESOURCES MANAGEMENT

The Federal Government's use of its information resources must keep pace with the changes in the U.S. economy and society. Without such an effort, the paperwork burden which federal agencies place upon the public cannot be significantly decreased. An in-depth review is needed to ensure that there are ongoing improvements within the system.

- Creates a Commission on Federal Information to examine the broad question of the quality of the Federal information infrastructure, including the statistical infrastructure. The functions of the Commission are: to study the statutes, policies, rules, regulations, procedures, and practices of the Federal Government relating to the gathering, processing, maintenance, use, disclosure, and sharing of information, and the imposition of recordkeeping requirements, and the management control of these information activities. Further, the Commission is to consider: ways to improve information resources management, ways to improve the quality of information and statistical data systems, ways to improve the sharing of information and statistical data, and other matters which the Commission may decide affect the collection of information and imposition of recordkeeping requirements by or for the Federal Government, and information resources management.

The structure of the Commission is patterned after Paperwork Commission. Membership includes: two Senators (from different parties), two representatives (from different parties), the OMB Director, one additional official or employee of the executive branch of the Federal Government, one representative from the National Archives and Records Administration, the Comptroller General of the United States, and five members of the public (from backgrounds in various information management disciplines). Except for the members of Congress and the OMB Director, the appointments are to be made by the President. The Commission must provide a final report to Congress within four years of its inception.

4. ESTABLISHES FEDERAL GOVERNMENT INFORMATION TECHNOLOGY AND OVERSIGHT RESPONSIBILITIES

Increases in the paperwork and recordkeeping burden may often be traced to legislation which directs various agencies to conduct activities which then require substantial information collection activities. In order to monitor, and to minimize the impact of such burdens, this Act provides for -

* A public evaluation of each bill or joint resolution which includes: an evaluation of the regulatory impact of such bill or resolution, an estimate of the subsequent number of individuals and businesses who would be regulated, a determination of the economic impact of such regulation on the individuals, a determination of the impact on personal privacy, and a determination of the amount of additional paperwork and recordkeeping that will result from the regulations to be promulgated under the bill or joint resolution.

* A statement of the reasons why compliance with the above may be impracticable when such evaluations cannot reasonably be made.

5. IMPROVES THE MANAGEMENT OF PUBLIC RECORDS

Public Records are an important component of the Federal Government's information resources. Improved management of this resource is required to ensure that the public interest is best served and to ensure that the Federal Government is truly able to meet the challenges of Information Resources Management.

* Makes provisions dealing with the disposal of Records binding upon all federal agencies.

* Provides for the development of standards which agencies to use in interpreting the definition of records.

* Provides for the examination of records for Historical Preservation by the Archivist of the United States.

DRAFT -- ARMA PRA REAUTHORIZATION ACT

101ST CONGRESS
2d Session S.________

IN THE SENATE OF THE UNITED STATES

Mr. ____________ introduced the following bill; which was read twice and referred to the Committee on ____________________

A BILL

To amend chapter 35 of title 44, United States Code, to reauthorize appropriations for the Office of Information and Regulatory Affairs in the Office of Management and Budget, to improve agency collection, use, sharing, and management of information and information resources, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Paperwork Reduction and Management Improvement Act of 1990".

TITLE I--INFORMATION COLLECTION AND SHARING BY FEDERAL AGENCIES

SEC. 101. FINDINGS AND PURPOSE.

(a) Section 3501 of title 44, United States Code, is amended to read as follows:

"§3501. Findings and purposes".

"(a) The Congress makes the following findings:

"(1) The collection of information and imposition of recordkeeping requirements conducted or sponsored by or for the Federal Government in all areas, especially with respect to small business, taxation, procurement, and international competitiveness, imposes a substantial burden on the public.

"(2) Efforts to curb the growth of such burden are necessary to induce Federal agencies to consider whether the collection of information and imposition of recordkeeping requirements are necessary for the proper performance of the functions of the agency, including whether these will have practical utility.

"(3) A central management authority is necessary to provide coordination and oversight of Federal policies and procedures and to facilitate agency accountability to the Congress and the public regarding the collection of information, the imposition of recordkeeping requirements, and other information management activities.

"(4) Public information is an essential tool for managing the government's operations, and is a valuable national resource that provides citizens with knowledge of their government, society, and economy. It is also itself often a commodity with economic value in the marketplace that serves the needs of some but only through the imposition of costs on others -- requiring a balance of the competing needs of each in order to assure cost-effective development and utilization of data.

"(b) The purposes of this chapter are--

"(1) to minimize the burden of the collection of information and the imposition of recordkeeping requirements by or for the Federal Government for small business, taxpayers, Federal contractors, profit and non-profit institutions, State and local governments, and other persons;

"(2) to facilitate the sharing of public information through efficient and cost-effective management of information resources;

"(3) to maximize the usefulness of information collected, maintained, used, retained, and shared by the Federal government;

"(4) to minimize the cost to the Federal Government of collecting, maintaining, using, retaining, and sharing information;

"(5) to coordinate, integrate, and, to the extent practicable and appropriate, make uniform Federal information policies and practices;

"(6) to ensure that government information resources management activities are conducted in a cost-effective manner as to--

"(A) improve the quality of decision making and program management;

"(B) increase productivity;

"(C) reduce waste and fraud; and

"(D) reduce unnecessary burden;

"(7) to further safeguard that cost effectiveness, by:

"(A) ensuring that an adequate and proper record created and maintained to protect the rights of the government and the public; and

"(B) ensuring that a permanent record of the Federal Government is identified and preserved.

"(8) to ensure that the collection, imposition of recordkeeping requirements, maintenance, use, disclosure, and sharing of information by or for the Federal Government is consistent with applicable laws, including laws relating to--

"(A) confidentiality of information, including section 552a of title 5, United States Code;

"(B) security of information, including the Computer Security Act of 1987 (Public Law 100-235);

"(C) access to information, including section 552 of title 5, United States Code; and

"(D) collection and sharing of information; and

"(E) management of records, including the Federal Records Act of 1950, title 44, United States Code, Chapters 29, 31 and 33.

"(9) to ensure the integrity, quality, efficiency, cost-effectiveness, and utility of the Federal statistical system; and

"(10) to ensure that automatic data processing systems, telecommunications systems, document management systems, library systems, and other information technologies are acquired and used by the Federal Government in an effective and efficient manner which improves service delivery and program management, increases productivity, improves the quality of decision making, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information, keep records, and otherwise disclose information to and for the Federal Government.".

(c) CLERICAL AMENDMENT.--The table of sections at the beginning of chapter 35, United States Code, is amended by striking the item relating to section 3501 and inserting in lieu thereof the following:

"3501. Findings and purposes.".

SEC. 102. DEFINITIONS.

Section 3502 of title 44, United States Code, is amended--

(1) in paragraph (3) (relating to the definition of

burden) by inserting "or for" before the words "a Federal" and by inserting before the semicolon the following: ", including the resources expended for reviewing instructions, searching existing data sources, obtaining, compiling and maintaining the necessary data, implementing recordkeeping requirements, completing and reviewing the collection of information, and transmitting or otherwise disclosing the information involved"; and

(2) in paragraph (11) (relating to the definition of information collection request) by striking "collection of information requirement,";

(3) in paragraph (13) (relating to the definition of information resources management) by inserting "and retention" after "use";

(4) in paragraph (16) by striking "and" after the semicolon at the end;

(5) in paragraph (17) by striking the period at the end and inserting in lieu thereof a semicolon; and

(6) by adding after paragraph (17) the following:

"(18) 'information collection request contained in a proposed rule' means an information collection request which is, or has been, subject to notice and comment procedures under section 553 of title 5, United States Code.".

SEC. 103. AUTHORITY AND FUNCTIONS OF DIRECTOR OF OMB.

(a) APPROVAL AND DISAPPROVAL AUTHORITY.--Section 3504(a) of title 44, United States Code, is amended by inserting "or disapproval" after "approval".

(b) PAPERWORK CONTROL FUNCTIONS.--Section 3504(c) of title 44, United States Code, is amended--

(1) by striking paragraph (5) and inserting in lieu thereof the following:

"(5) establishing procedures for agencies to estimate under section 3507(a) the burden, in terms of time expended, that will result from a proposed agency information collection request;";

(2) by striking "and" at the end of paragraph (6);

(3) by striking the period at the end of paragraph (7) and inserting in lieu thereof a semicolon; and

(4) by adding at the end the following:

"(8) promoting the reduction of unnecessary burden imposed through Federal information collection requests, with particular emphasis on the social and economic sectors most heavily burdened, such as small businesses, taxpayers, Federal contractors, educational institutions, State and local governments, and those engaged in international competition; and

"(9) initiating and conducting, with the cooperation and participation of interested persons, information management associations, small businesses, government contractors, and agencies designated by the Director, pilot projects and similar programs to test or demonstrate the feasibility and value of changes in Federal information collection policies, procedures and related activities, including, on a nondelegable basis and solely for the purposes of this provision, waiving the application of any agency regulation or administrative directive; provided that the Congress is timely informed regarding the intent, progress, and findings of activities involving such waiver.".

(b) STATISTICAL POLICY AND COORDINATION FUNCTIONS.--Section 3504(d) of title 44, United States Code, is amended--

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting in lieu thereof a semicolon, and

(3) by adding at the end the following new paragraphs:

"(8) promoting the timely release of statistical data to the public; and

"(9) establishing an interagency working group on statistical policy consisting of the heads of the agencies with important statistical programs to improve the integrity, quality, and utility of the Federal statistical system.".

(c) PRIVACY FUNCTIONS.--Section 3504(f) of title 44, United States Code, is amended--

(1) by striking "and" at the end of paragraph (2);

(2) by striking the period at the end of paragraph (3) and inserting in lieu thereof "; and"; and

(3) by adding at the end the following new paragraph:

"(4) overseeing the development of new information systems by Federal agencies containing personal information to ensure compliance with information policies, principles, standards, and guidelines, and existing information privacy laws.".

(d) INFORMATION SHARING FUNCTIONS.--Section 3504(h) of title 44, United States Code, is amended to read as follows:

"(h) The information sharing functions of the Director shall include--

"(1) developing policies and practices for the sharing of public information consistent with the agency responsibilities set forth in section 3506(9); and

"(2) developing policy guidelines, after notice and providing opportunity for public comment, that instruct Federal agencies on ways to fulfill information sharing functions and activities that--

"(A) make public information products and services available on timely, equitable, and cost-effective terms; and

"(B) encourage a diversity of public and private information products and services.".

SEC. 104. REVIEW AND REDUCTION OF PAPERWORK BURDEN OF AGENCY PROGRAMS.

(a) MINIMIZING PAPERWORK BURDEN.--Section 3505 of title 44, United States Code, is amended to read as follows:

"§3505. Minimizing paperwork burden

"(a) In carrying out functions under this chapter, the Director shall--

"(1) identify areas of duplication and unnecessary burden in the collection of information and the imposition of recordkeeping requirements by or for the Federal Government, and develop a schedule and methods for eliminating such duplication and unnecessary burden; and

"(2) issue and, as needed, revise regulations establishing requirements for--

"(A) agency reviews of information collection requests; and

"(B) agency estimates of the burden that will result from the collection of information and the imposition of recordkeeping requirements.

"(b) The Director and the agencies shall carry out functions related to control of the collection of information and the imposition of recordkeeping requirements under this chapter with the goal of reducing unjustified and unnecessary burden on all persons, such as small businesses, taxpayers, Federal contractors, and those engaged in international competition, resulting from the collection of information and the imposition of recordkeeping requirements carried out by or for the Federal Government.".

(b) CONFORMING AMENDMENT.--The table of sections at the beginning of chapter 35 of title 44, United States Code, is amended by striking the item relating to section 3505 and inserting in lieu thereof the following:

"3505. Minimizing paperwork burden.".

SEC. 105. FEDERAL AGENCY RESPONSIBILITIES.

(a) TECHNICAL AMENDMENT.--Section 3506(a) of title 44, United States Code, is amended by inserting "resources" after "its information".

(b) IMPLEMENTATION OF AGENCY RESPONSIBILITIES.--Section 3506(b) of title 44, United States Code, is amended--

(1) by striking "(b)" and inserting in lieu thereof "(b)(1)";

(2) in paragraph (1) (as designated by paragraph (1) of this subsection) by striking ", within three months after the date of the enactment of this Act,"; and

(3) by adding at the end the following:

"(2) Each official designated pursuant to paragraph (1) shall be the head of an office, established by the head of each agency, responsible for assuring agency compliance with and implementation of the information collection review process, information resources management, and other policies and guidance provided pursuant to this chapter. Staff to such office shall be well-qualified through experience or training to carry out such information resources management policies and guidance."

(c) MINIMIZING PAPERWORK BURDEN.--Section 3506(c) of title 44, United States Code, is amended--

(1) by striking "and" after the semicolon at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following:

"(9) prepare estimates of burden that will result from agency information collection requests.".

(d) AGENCY REVIEWS OF INFORMATION COLLECTION REQUESTS AND OF PAPERWORK BURDEN.--Section 3506 of title 44, United States Code, is amended by adding at the end the following:

"(e) The head of each agency, or the official designated under subsection (b), shall independently review and approve each collection of information request before it is submitted to the Director for review, certify to the Director that the information collection request meets the policies and guidance provided pursuant to this chapter, and submit the information collection request for review in accordance with section 3507.

"(1) This internal agency paperwork review process shall--

"(A) be sufficiently independent of program responsibilities to evaluate fairly whether each collection of information and imposition of recordkeeping requirements should be carried out,

"(B) have sufficient resources to carry out such responsibility effectively, and

"(C) have authority independent of agency program officers to approve, disapprove, and make needed improvements in any agency collection of information request.

"(2) The agency head, or the official designated under subsection (b), shall ensure that the collection of information, imposition of recordkeeping requirements, and any related instructions--

"(A) are the least burdensome necessary for the proper performance of the agency's functions;

"(B) are not duplicative of information otherwise reasonably accessible to the agency;

"(C) have practical utility;

"(D) use plain and unambiguous language and are understandable to those who are to comply;

"(E) explain the need and ultimate use of the information to be collected, the records to be kept, and the importance of accurate and timely compliance; and

"(F) use cost-effective and efficient statistical survey methodology appropriate to the need for which the data is to be collected; and

"(3) In the course of this internal paperwork review process, the agency shall take the steps necessary--

"(A) to give notice to and consult with interested agencies and members of the public in order to enhance the clarity of that collection of information and to minimize its burden on respondents;

"(B) to plan and allocate resources for the efficient and cost-effective management and use of the information to be obtained; and

"(C) to take the actions required under section 3507.

"(4) As part of the internal agency review of any major information collection request not contained in a proposed rule, as defined by the Director in a regulation (and not subject to a request for emergency clearance under section 3507(g)), the agency shall also--

"(A) publish a notice in the Federal Register which includes a statement of why the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

"(B) provide a 60-day period for the submission of comments by the public regarding its need and burden; and

"(C) state in the notice that, at the end of the 60-day period, the agency will consider the public comments in issuing the final information collection request, and thereafter certify the information collection request to the Director for review under this chapter.

"(f)(1) Not less than once every 3 years each agency shall review each currently approved information collection request.

"(2) An agency conducting a review under this subsection shall publish notice of the review in the Federal Register, including a description of the scope, need, and burden of each information collection request to be reviewed. Such notice shall give interested persons a 60-day period for the submission of comments regarding--

"(A) the continued necessity for the information collection request for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency; and

"(B) the burden on respondents.

"(3) Each agency review under this subsection shall include an evaluation of--

"(A) any public comments received by the agency concerning the information collection request being reviewed;

"(B) whether the information collection request continues to be necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency; and

"(C) whether the burden of the information collection request can be reduced consistent with the proper performance of the functions of the agency.

"(4) Upon completion of the review under this subsection, each agency shall certify to the Director, based on this review, that the implementation of the information collection request is consistent with the policies and guidance provided pursuant to this chapter, and shall submit the information collection request for review in accordance with section 3507.

"(g) The head of each agency shall establish and maintain a management system for the sharing of public information that--

"(1) makes public information products and services available on a timely, equitable, and cost-effective basis to all persons;

"(2) encourages a diversity of public and private information products and services operating efficiently and economically, in order to make the information available to the public and take advantage of proven available information technology in a cost-effective manner;

"(3) establishes and maintains a process through which the public can comment on agency decisions concerning the sharing of public information products and services;

"(4) provides to the depository library program the appropriate government documents, including, as appropriate for the efficient and cost-effective sharing of information, public information products in electronic formats;

"(5) have the agency, in managing the sharing of public information, consider--

"(A) whether sharing is required by law;

"(B) whether sharing is necessary and cost-effective for the proper performance of agency functions;

"(C) if an information product or service available from other public or private sources is equivalent to an agency product or service and reasonably achieves the cost-effective sharing of the agency product or service at least cost to the Federal agency; and

"(D) the economy and efficiency of Government operations.

"(h)(1) The head of each agency shall keep Congress fully informed of its implementation of the policies and guidance provided pursuant to this chapter, and shall annually submit to the Congress a report on such implementation.

"(2) The report required under this subsection shall include the following:

"(A) A separate estimate and evaluation of each of the following:

"(i) The burden, and any decrease or increase therein, that resulted from information collection requests that were conducted or sponsored by or for the agency during the year preceding the year covered by the report;

"(ii) The burden that resulted, and any decrease or increase therein, as a consequence of the changes made by the agency in its information collection requests during the year covered by the report.

"(B) A description of the agency's efforts in implementing, and plans to implement in the future, the applicable policies, standards, and guidelines with respect to information collection, paperwork and recordkeeping burden reduction, use of the Federal Information Locator System, statistical activities, records management activities, privacy and security of records, sharing of information, acquisition and use of information technology, and other information resources management functions set forth in this chapter.

"(i) Any written communications to an agency or to any employee thereof from any person not employed by the Federal Government, or from the Office of Information and Regulatory Affairs, concerning a proposed information collection request, and any written communication from such agency or employee to such person or the Office of Information and Regulatory Affairs concerning such proposal, shall be made available to the public. This subsection shall not require the disclosure of any information which is protected at all times by procedures established for information which has been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy; or communications concerning violations of the provisions of this chapter, the disclosure of which could lead to adverse action against the communicator.".

SEC. 106. DIRECTOR'S REVIEW OF INFORMATION COLLECTION REQUESTS.

(a) GENERAL REQUIREMENTS FOR INFORMATION COLLECTION REQUESTS.--Section 3507(a) of title 44, United States Code, is amended to read as follows:

"(a) An agency shall not conduct or sponsor an information collection request unless, in advance of the adoption or revision of such request--

"(1) the agency has taken actions, including consultation with the Director, to--

"(A) eliminate, through the use of the Federal Information Locator System and other means, information collection requests which seek information available from another source within the Federal Government;

"(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to or for the agency; and

"(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public; and

"(D) establish appropriate agency recordkeeping requirements for the information collected in accordance with 44 USC, including the determination and final disposition.

"(2) the agency has submitted to the Director--

"(A) the proposed information collection request;

"(B) copies of such pertinent regulations and other related materials as the Director may specify;

"(C) an explanation of actions taken to carry out paragraph (1); and

"(D) a summary of comments received from the public, if applicable;

"(3) the agency publishes in the Federal Register a notice--

"(A) which states that the agency has submitted the request to the Director; and

"(B) which includes--

"(i) a title for the information collection request;

"(ii) a brief description of the need for the information, and its proposed use;

"(iii) a summary of the information being sought and the recordkeeping requirements imposed by the information collection request;

"(iv) a description of the likely respondents and proposed frequency of response to the information collection request;

"(v) an estimate of the burden that will result from the information collection request, with particular emphasis on the burden to be placed on small business and government contractors; and

"(vi) an identification of an official at the Office of Information and Regulatory Affairs and at the agency to whom comments may be submitted, including a telephone number and an address; and

"(4) the Director has approved the information collection request, or the period for review by the Director provided under subsection (b) or (c), as applicable, has elapsed.".

(b) DIRECTOR'S REVIEW OF INFORMATION COLLECTION REQUEST NOT CONTAINED IN A PROPOSED RULE.--Section 3507(b) of title 44, United States Code, is amended--

(1) in the first sentence--

(A) by striking "within sixty days of receipt of a proposed information collection request," and inserting in lieu thereof "within 60 days after publication of the notice under subsection (a)(3) that is applicable to a proposed information collection request not contained in a proposed rule";

(B) by striking "the request" and inserting in lieu thereof "the proposed information collection request"; and

(B) by striking ", including an explanation thereof,";

(2) by inserting after the first sentence the following: "Any decision to disapprove an information collection request not contained in a proposed rule shall include an explanation of the reasons for such decision.";

(3) in the penultimate sentence--

(A) by striking "a request" and inserting in lieu thereof "a proposed information collection request not contained in a proposed rule";

(B) by striking "sixty" and inserting in lieu thereof "60"; and

(C) by striking "thirty" and inserting in lieu thereof "30"; and

(4) in the last sentence--

(A) by striking "sixty" and inserting in lieu thereof "60"; and

(B) by striking "thirty" and inserting in lieu thereof "30".

(c) DIRECTOR'S REVIEW OF INFORMATION COLLECTION REQUESTS CONTAINED IN A PROPOSED RULE.--Section 3507(c) of title 44, United States Code, is amended to read as follows:

"(c)(1) As soon as practicable, but no later than publication of a notice of proposed rule making in the Federal Register, each agency shall forward to the Director a copy of any proposed rule which contains an information collection request along with other materials required under subsection (a)(2).

"(2) Not later than 60 days after the notice of proposed rule making is published in the Federal Register, the Director may file public comments concerning whether the information collection request contained in the proposed rule meets the requirements of the standards set forth in section 3508.

"(3) When a final rule is published in the Federal Register, the agency shall explain how the information collection request contained in the final rule responds to the comments, if any, filed by the Director or the public, or explain why it rejected those comments.

"(4) The Director may not disapprove any information collection request contained in a proposed agency rule reviewed under this subsection, if the Director received notice and failed to comment on the rule within 60 days after publication of the notice of proposed rule making.

"(5) Nothing in this subsection prevents the Director, in his or her discretion--

"(A) from disapproving any information collection request which is not contained in an agency rule;

"(B) from disapproving any information collection request contained in an agency rule, if the agency failed to comply with the requirements of this subsection;

"(C) from disapproving any information collection request in a final agency rule, if the Director finds within 60 days after publication of the final rule that the agency's response to his or her comments filed pursuant to paragraph (2) of this subsection was unreasonable; or

"(D) from disapproving any information collection request contained in a rule reviewed under this subsection if--

"(i) the Director determines that the agency has substantially modified in the final rule the information collection request contained in the proposed rule; and "(ii) the agency has not provided to the Director the information required under this subsection, with respect to any such modification at least 60 days before the issuance of the final rule.

"(6) The Director shall make publicly available any decision to approve or disapprove an information collection request contained in an agency rule reviewed under this subsection, together with the reasons for such decision.

"(7) The authority of the Director under this subsection is subject to subsection (i).

"(8) This subsection shall apply only when an agency publishes a notice of proposed rule making and requests public comments under section 553 of title 5, United States Code.

"(9) There shall be no judicial review of any kind of the Director's decision to approve or not act upon an information collection request reviewed under this subsection."

(d) APPROVALS AND DISAPPROVALS.--Section 3507(d) of title 44, United States Code, is amended--

(1) by inserting "(1)" at the beginning thereof; and

(2) by adding at the end thereof the following new paragraphs:

"(2)(A) No later than 90 days before the expiration of an approval granted by the Director to a currently approved information collection, the head of the agency, or the senior official designated under section 3506(b), shall have completed the review and provided the certification required by section

3506(f).

"(B) Upon receipt of such certification, the Director shall, except as provided in paragraph (4) of this subsection, approve the collection of information for a period of three years.

"(C) If such a certification is not provided to the Director during the 60-day period before the expiration of the approval, the agency shall submit the collection of information for review and possible approval or disapproval under this section.

"(3) An agency may not make a substantive or material modification to a collection of information after it has been approved by the Director, unless the modification has been submitted to the Director for review and possible approval or disapproval under this section.

"(4) The Director may at any time, after notice in the Federal Register and to the agency stating the reasons therefor, direct an agency to submit a collection of information for review and possible approval or disapproval under this section."

(e) TECHNICAL AMENDMENTS.--

(1) Section 3507(e) of title 44, United States Code, is amended in the first sentence by striking "proposed requests" and inserting in lieu thereof "proposed information collection requests".

(2) Section 3507(f) of title 44, United States Code, is amended by inserting "by which the collection of information will be carried out" after "information collection request".

(3) Section 3507(h) of title 44, United States Code, is

amended by inserting in the last sentence before the period "; or communications concerning violations of the provisions of this chapter, the disclosure of which could lead to adverse action against the communicator".

(f) EMERGENCY CLEARANCE OF AN INFORMATION COLLECTION REQUEST.--Section 3507(g) of title 44, United States Code, is amended--

(1) in the first sentence--

(A) by inserting "or (c)" after "subsection (b)"; and

(B) by striking "sixty-day period" each place it appears and inserting in lieu thereof "60-day period"; and

(2) in the last sentence by striking "ninety" and inserting in lieu thereof "90".

(g) AGENCY OVERRIDE OF DISAPPROVAL.--Section 3507(h) of title 44, United States Code, is amended by adding at the end the following:

"(i)(1) Any disapproval by the Director, in whole or in part, of a proposed or currently approved information collection request of an independent regulatory agency, including one contained in a rule, and any exercise of authority of the Director under section 3509 concerning such an agency, shall be voided as provided in paragraph (3) by the majority vote of the governing body of the independent regulatory agency to override the disapproval or exercise of authority.

"(2) An independent regulatory agency that overrides a disapproval or exercise of authority of the Director shall--

"(A) publish in the Federal Register a notice of that override, including--

"(i) any explanation of the Director for the disapproval or exercise of authority, if provided to the agency;

"(ii) the response of the agency to that explanation; and

"(iii) the reasons for the agency override;

"(B) submit a copy of the notice to the Comptroller General; and

"(C) certify the override to the Director, explaining the reasons for the override.

"(3) Upon receipt of an override certification from an independent regulatory agency under paragraph (2)(C) regarding an information collection request--

"(A) the Director shall without further delay grant approval and assign a control number to such information collection request; and

"(B) such approval and control number shall be valid for a period of not more than 3 years."

(h) EFFECT ON BURDEN REDUCTIONS.--Section 3507 of title 44, United States Code, is further amended by adding at the end the following:

"(j) Upon request by the head of an agency, the Director shall approve a proposed change to a currently approved information collection request no later than 30 days after the Director receives the proposed change, and the information collection request shall thereafter remain in effect for the remainder of the period for which it was previously approved by the Director (or such longer period, up to 3 years, as the Director may approve), if--

"(1) the information collection request has a currently approved control number; and

"(2) the Director determines that the change--

"(A) reduces the burden resulting from the information collection request; and

"(B) does not substantially change the information collection request.".

SEC. 107. FEDERAL INFORMATION LOCATOR SYSTEM.

Section 3511 of title 44, United States Code, is amended to read as follows:

"§3511. Establishment and operation of Federal Information Locator System

"(a) the Director shall cause to be established and maintained a Federal Information Locator System (hereinafter in this section referred to as the 'system'), which shall--

"(1) serve as a comprehensive inventory, and as the authoritative register, of all information collection requests by or for the Federal Government; and

"(2) be designated to assist agencies and the public in locating Government information.

"(b) In designing the system, the Director shall--

"(1) designate as necessary one or more agencies to operate the system;

"(2) require the head of each agency to prepare in a form to the specified by the Director, and to submit for inclusion in the system, a data profile for each--

"(A) system of records of the agency required to be identified under section 552a of title 5; and

"(B) information collection request approved by the Director under this chapter;

"(3) ensure that no information which is not public information is included in the system.

"(c) Within one year after the date of the enactment of the Paperwork Reduction and Management Improvement Act of 1990, the Director shall--

"(1) determine, in consultation with other interested agencies, the optimal composition of the system in order to accomplish its purposes; and

"(2) report to the Congress and its committees on the status of the development and implementation of the system, including the Director's determination as to the composition of the system and appropriate operating entity."

SEC. 108. CONSULTATION WITH OTHER AGENCIES AND THE PUBLIC.

Section 3517 of title 44, United States Code, is amended--

(1) by inserting "(a)" before the first sentence; and

(2) by adding the following new subsections:

"(b)(1) In order to facilitate such opportunity to comment, on an ongoing basis, the Director shall establish an Advisory Committee on Statistical Policy. Such committee shall consist of no less than twenty members appointed by the Director. In appointing members of the committee, the Director shall ensure that the committee is fairly balanced with respect to the points of view represented by members of the committee, and includes appropriate members of the statistics-user and statistics-provider communities, appointed from among individuals representing academia, business, research organizations, State and local governments, public interest groups, and others.

"(2)(A) Except as provided in subparagraph (B), the term of a member of the committee shall be 2 years.

"(B) Of the members first appointed to the Committee--

"(i) 10 shall be appointed for an initial term of 2 years; and

"(ii) 10 shall be appointed for an initial term of 3 years.

"(C) A member of the committee may be reappointed for any number of terms.

"(3) No later than 180 days after the date of enactment of the Paperwork Reduction and Management Improvement Act of 1990, the Director shall complete the initial appointment of members to the Advisory Committee on Statistical Policy.

"(4) The committee shall--

"(A) identify national long-term statistical data needs that can and should be filled by the Federal Government, and make recommendations to the Director regarding Federal responses to those needs;

"(B) make recommendations to the Director for establishing priorities for Federal statistical policy initiatives and for implementing the statistical functions assigned to the Director under this title and other laws; and

"(C) make any other recommendations regarding Federal statistical operations that would, in a cost effective way, contribute to the general economic or social welfare or to the competitive position of the United States in the global economy.

"(5) The Director may establish any other advisory committee as may be appropriate."

SEC. 109. ACCESS TO INFORMATION.

Section 3519 of title 44, United States Code, is amended--

(1) by inserting "(a)" before the first sentence;

(2) in the first sentence, by inserting after "Affairs" the following: ", and the head of each agency or the official designated under section 3506(b),"; and

(3) by adding at the end the following new subsections:

"(b) The Comptroller General shall review and annually submit to the Congress a report regarding--

"(1) the performance by the Director of the functions under this chapter;

"(2) the activities and accomplishments of the agencies as outlined in the annual reports provided to Congress under section 3506 and 3514; and

"(3) the performance by the Comptroller General of the functions under this chapter."

SEC. 110. TECHNICAL AND CONFORMING AMENDMENTS.

(a) SECTION 3509.--Section 3509 of title 44, United States Code, is amended by striking "3507(c)" and inserting in lieu thereof "3507(i)".

(b) SECTION 3513.--Section 3513(a) of such title is amended in the first sentence by inserting "resources" after "information".

(c) SECTION 3514.--Section 3514(a) of title 44, United States Code, is amended in paragraph (9)(C) by striking "paragraphs (5) and (6) of section 3505" and inserting in lieu thereof "section 3505(c)(2) and (3)".

SEC. 111. AUTHORIZATION OF APPROPRIATIONS.

Section 3520(a) of title 44, United States Code, is amended by striking "$5,500,000 for each of the fiscal years 1987, 1988, and 1989" and inserting in lieu thereof "$6,500,000 for fiscal year 1991, $7,000,000 for fiscal year 1992, $7,500,000 for fiscal year 1993, $8,000,000 for fiscal year 1994, and $8,500,000 for fiscal year 1995".

TITLE II--COMMISSION ON FEDERAL INFORMATION RESOURCES MANAGEMENT

SEC. 201. DECLARATION OF PURPOSE.

The Congress finds that--

(1) information resources management needs to integrate the collection, imposition of recordkeeping requirements, processing, maintenance, use, disclosure, and sharing of data among the Federal Government, State and local governments, business, and the public in equitable and cost-effective ways;

(2) the advent of new forms and wide availability of automatic data processing equipment and electronic telecommunications offers expanding opportunities for new forms of recordkeeping, communication, marketing, financial funds transfer, education, and international commerce, while simultaneously raising sensitive issues of privacy, confidentiality, and storage costs of data;

(3) the quality and nature of the Federal information and statistical data system has not kept pace with changes in the United States economy and society;

(4) the need for the efficient use and integration of all information management technologies and disciplines has grown significantly with the availability of new systems and equipment;

(5) the Federal Government, State and local governments, business, and the public are an important source of information, both for their own respective uses and for use by others;

(6) The collection of information and imposition of recordkeeping requirements by or for the Federal Government

continues to place an unprecedented paperwork burden upon small business, taxpayers, educational institutions, recipients of Federal assistance, profit and non-profit institutions, governmental contractors, and State and local governments; and

(7) a renewed effort is required to assure that the Federal Government minimizes the burden of information collection, disclosure, and recordkeeping, consistent with its needs for high quality information to set policy and properly perform its functions, and that it improves information resources management, to assure equitable and cost-effective collection, recordkeeping, processing, maintenance, use, disclosure, and sharing of information.

SEC. 202. ESTABLISHMENT OF THE COMMISSION.

To accomplish these purposes, there is hereby established a Commission on Federal Information Resources Management (hereinafter referred to as the "Commission").

SEC. 203. FUNCTIONS OF THE COMMISSION.

(a) STUDY.--The Commission shall study and investigate statutes, policies, rules, regulations, procedures, and practices of the Federal Government relating to the gathering, processing, maintenance, use, disclosure, and sharing of information and the imposition of recordkeeping requirements, and the management and control of these information activities. The Commission shall consider--

(1) ways to improve information resources management, including consideration of--

(A) the nature and extent of current Federal, State, local government, business, small business, and private needs for information from other public and private entities;

(B) the policies and practices relating to the maintenance of confidentiality of information and protection of privacy, and their impact upon Federal information resources management activities;

(C) the procedures used and the extent to which considerations of economy, efficiency, and cost-effectiveness impact upon Federal information management resources management, particularly as these matters relate to costs burdening the Federal Government, and other providers, owners, and users of information;

(D) the effect of existing statutes on the current Federal, State, local government, business, small business, and private needs for information and improved information resources management;

(E) the nature and extent of management and control over the determination of current Federal, State, local government, business, small business, and private needs for information and information resources, and how these affect the choice of methods for collecting, processing, maintaining, using, disclosing, and sharing of information and imposition of recordkeeping requirements;

(F) the effective utilization of all information management disciplines including data processing, telecommunications, and records management to ensure that the management of all information resources is maximized and that a permanent record of the activities of the Federal Government is created, preserved and made available;

(2) ways to improve the quality of information and statistical data systems, including consideration of--

(A) how the changing structure of the American economy and international competition affects the quality and nature of the Federal, State, local government, business, small business, and private information and statistical data systems;

(B) the need for coordination and development of comparative information and statistical data systems for international commerce, between the United States and the European Community, and the developed and lesser developed countries generally;

(C) possible improvement and redesign of ongoing information and statistical data systems to fill existing needs without undermining the validity and utility of existing data bases;

(D) priorities for the collection of information and statistical data, considering the quality, timeliness, relevance, and public need for such information;

(3) ways to improve the sharing of information and statistical data, including consideration of--

(A) the nature and extent to which Federal agencies, State and local governments, business, small business, and private parties now work together in determining reasonable information needs, in collecting, processing, maintaining, using, disclosing, and sharing of information, imposing recordkeeping requirements, and in managing information resources;

(B) equitable and cost-effective sharing of electronic and paper-based information between the Federal Government, State and local governments, business, small business, and public parties to assure that reasonable public needs are met;

(C) costs of collecting, processing, maintaining, using, disclosing, and sharing information and keeping records, including the costs of sharing these costs among different governments and other users of information, equitably and cost-effectively;

(D) ways to further improve the security and privacy of sensitive information in Federal and other computer systems; and

(4) such other matters as the Commission may decide affect the collection of information and imposition of recordkeeping requirements by or for the Federal Government, and information resources management.

(b) The Commission shall ascertain what changes are possible and desirable in existing statutes, policies, rules, regulations, procedures, and practices relating to the collection of information and imposition of recordkeeping and disclosure requirements by or for the Federal Government, and information resources management in order to accomplish the purposes set forth in section 201 and to resolve the findings made pursuant to this section.

(c) FINAL REPORT.--Within 4 years after the date of the first meeting of the Commission, the Commission shall submit a final report to the Congress and the President. The final report shall contain a review of its findings and its recommendation for changes in statutes, policies, rules, regulations, procedures, and practices. If the Congress is not in session at the end of such 4-year period, the final report shall be submitted to the Clerk of the House and Secretary of the Senate. The Commission may make such interim reports and recommendations as it determines advisable.

(d) OFFICE OF MANAGEMENT AND BUDGET IMPLEMENTATION.--Upon submission of the Commission's final report, the Office of Management and Budget, in coordination with the executive agencies, shall take action to--

(1) formulate the views of the executive agencies on the recommendations of the Commission;

(2) to the extent practicable within the limits of their authority and resources of each such agency, carry out the recommendations of the Commission in which they concur; and

(3) propose legislation needed to carry out or to provide authority to carry out other recommendations of the Commission in which they concur.

(e) OFFICE OF MANAGEMENT AND BUDGET REPORT.--At least once every 6 months, the Office of Management and Budget shall report to the Congress and the President on the status of action taken or to be taken under this section. A final report shall be submitted within 2 years.

SEC. 204. MEMBERSHIP OF THE COMMISSION

(a) The Commission shall be composed of 15 members, including--

(1) 2 Members of the Senate (who shall not be members of the same political party) appointed by the President of the Senate;

(2) 2 Members of the House of Representatives (who shall not be members of the same political party) appointed by the Speaker of the House of Representatives;

(3) the Director of the Office of Management and Budget and 1 other official or employee of the executive branch of the Federal Government appointed by the President of the United States;

(4) the Comptroller General of the United States;

(5) 1 Representative of the National Archives and Records Administration;

(6) 2 members from among officials of the State and local governments (who shall not be members of the same political party) appointed by the President of the United

States; and

(7) 5 members from among persons in the private sector, including small business, labor, and other interested groups (no more than 3 of whom shall be of the same political party), appointed by the President of the United States. Further, the background of private sector members shall reflect the various information management disciplines which are used within the federal government including, but not limited to: data processing, telecommunications, and records management.

(b) CHAIRMAN.--The Commission shall select a Chairman and Vice Chairman from among its members.

(c) QUORUM.--8 members of the Commission shall constitute a quorum.

(d) VACANCIES.--Any vacancies in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

SEC. 205. COMPENSATION OF MEMBERS OF THE COMMISSION.

(a) PRIVATE MEMBERS.--Except as provided in subsection (b), members of the Commission shall each receive as compensation the daily equivalent of the annual rate of basic pay in effect for grade GS-18 (including travel time) during which they are engaged in the actual performance of duties vested in the Commission.

(b) GOVERNMENT MEMBERS.--Members of the Commission who are Members of Congress or who are full-time officers or employees of the United States shall receive no additional compensation for their service on the Commission.

(c) TRAVEL EXPENSES.--While away from their homes or regular places of business in the performance of service for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5 of the United States Code.

SEC. 206. POWERS OF THE COMMISSION.

(a) HEARINGS.--The Commission, or at its direction, any subcommittee or member thereof, may, for purposes of carrying out the provisions of this title, hold such hearings, sit and act at such times and places, take such testimony, receive such evidence and administer such oaths, as the Commission or such subcommittee or member may determine advisable. Attendance of private witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or before such subcommittee or member.

(b) SUBPOENAS.--(1) The Commission may require by subpoenas the attendance and testimony of such private witnesses and production of books, records, correspondence, memoranda, papers, documents and electronically stored information from such private witnesses as the Commission may determine advisable. Subpoenas may be issued under the signature of the Chairman or Vice Chairman and may be served by any person designated by the

Chairman or Vice Chairman. The subpoenas of the Commission shall be served in a manner provided for subpoenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(2) If a private person issued a subpoena under paragraph (1) is guilty of contumacy or refuses to obey such subpoena, any district court of the United States within the judicial district within which the hearing is conducted or within the judicial district within which such person is found or resides or transacts business may, upon application made by the Attorney General of the United States, order such person to appear before the Commission or a subcommittee or member thereof, to produce evidence or to give testimony touching the matter under inquiry. Any failure of any such person to obey any such order of the court may be punished by such court as contempt thereof.

(3) Notwithstanding the provisions of paragraphs (1) and (2), a person shall be excused from testifying from producing such books, records, correspondence, memoranda, papers documents or electronically stored information or other evidence in obedience to a subpoena, if such person states in writing to the court ordering his attendance and testimony that the required testimony or evidence may tend to incriminate him or subject him to a criminal penalty.

(c) PERSONNEL.--The Commission may appoint and fix the compensation of personnel without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and such personnel may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at a rate not to exceed the maximum rate authorized by the General Schedule. In addition, the Commission may procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for the maximum authorized by the General Schedule.

(d) EDUCATIONAL CONSULTANTS.--The Commission is authorized to negotiate and enter into contracts with private organizations, information management associations and education institutions to carry out such studies and prepare such reports as the Commission determines are necessary in order to carry out its duties.

SEC. 207. COOPERATION WITH FEDERAL AGENCIES.

(a) FURNISHING INFORMATION.--Each department and agency of the Federal Government is authorized to furnish to the Commission, upon requests made by the Chairman, such data, reports, and other information not otherwise prohibited by law, as may be agreed between the department or agency and the Chairman or Vice Chairman of the Commission. All such requests shall be made by the Chairman or Vice Chairman of the Commission.

(b) PROVISION OF SERVICES.--The head of each department or agency of the Federal Government is authorized to provide to the Commission such services as the Commission requests on such basis, reimbursable or otherwise, as may be agreed between the department or agency and the Chairman or Vice Chairman of the

Commission. All such requests shall be made by the Chairman or Vice Chairman of the Commission.

SEC. 208. TERMINATION OF THE COMMISSION.

One hundred and twenty days after the submission of the final report provided for in section 203, the Commission shall cease to exist.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title.

TITLE III--FEDERAL GOVERNMENT INFORMATION TECHNOLOGY AND OVERSIGHT RESPONSIBILITIES

SEC. 301. PUBLIC EVALUATION OF CONGRESSIONAL ACTIONS

Rule XI of the Rules of the House of Representatives is amended by adding at the end thereof a new clause 7 (modeled on Rule 26.11b of the Standing Rules of the Senate) as follows:

"7. (a) The report accompanying each bill or joint resolution of a public character reported by any committee (except those by the Committee on Appropriations) shall contain--

"(1) an evaluation, made by such committee, of the regulatory impact which would be incurred in carrying out the bill or joint resolution. The evaluation shall include (A) an estimate of the numbers of individuals and businesses who would be regulated and a determination of the groups and classes of such individuals and classes of such individuals and businesses, (B) a determination of the economic impact of such regulation on the individuals, consumers, and businesses affected, (C) a determination of the impact on the personal privacy of the individuals affected, and (D) a determination of the amount of additional paperwork and recordkeeping that will result from the regulations to be promulgated pursuant to the bill or joint resolution, which determination may include, but need not be limited to, estimates of the amount of time and financial costs required of affected parties, showing whether the effects of the bill or joint resolution could be substantial, as well as reasonable estimates of the recordkeeping requirements that may be associated with the bill or joint resolution; or

"(2) in lieu of such evaluation, a statement of the reasons why compliance by the committee with the requirements of clause (1) is impracticable.

"(b) It shall not be in order for the House of Representatives to consider any such bill or joint resolution if the report of the committee on such bill or joint resolution does not comply with the provisions of paragraph (a) on the objection of any Member of the House of Representatives."

SEC. 302. MANDATORY USE OF FTS2000 BY FEDERAL AGENCIES

Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is amended by adding at the end the following:

"(h)(1) Except as provided in paragraph (2), no head of a Federal agency shall procure or authorize the procurement of any service which is subject to the requirements of this section if that service is determined by the Administrator to be available under the FTS2000 contract.

"(2) Paragraph (1) shall not apply to any procurement of a service by a Federal agency--

"(A) under the FTS2000 contract; or

"(B) if the head of the agency establishes to the satisfaction of the Administrator that--

"(i) the agency's requirement for the service is outside the scope of the FTS2000 contract or any modification or option exercised thereto; and

"(ii) the General Services Administration approved in advance the procurement strategy the agency intends to use for the acquisition pursuant to a delegation of authority that otherwise meets the requirements of subsection (b)(2).

"(3) In this subsection the term 'FTS2000 contract' means any of the contracts let by the Administrator for the acquisition of inter-city telecommunication services which are commonly referred to collectively by that term."

TITLE IV -- REDUCTION OF PAPERWORK IN THE PROCUREMENT PROCESS

SEC. 401. DEFINITION OF TERMS

(a) COMMERCIAL PRODUCT. - This term is defined as a product, such as an item, material, component, subsystem, system or service which is or which has been offered for sale or which has been traded to the general public market in the course of normal business operations; including new, modified and discontinued products.

(b) SIMILAR PRODUCTS. - Within the context of this bill, the term "similar products" is defined as other commercial products, offered by any vendor, which are considered by general public markets to be functionally comparable competitive offerings; based upon an analysis of the intended purposes and applications of the commercial products.

(c) COMMERCIAL PRODUCT PROCUREMENT ACTION. - This term is defined to mean any procurement action which involves the acquisition of commercial products, and any offer or proposal to supply commercial products by an offeror, contractor, or subcontractor, including commercial products offered or acquired in connection with contract changes or modifications.

(d) GENERAL PUBLIC MARKET. - This term is defined to mean customers other than government customers who are affiliated with the contractor or offeror.

SEC. 402. RESPONSIBILITIES OF THE OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP)

(a) REQUIRED REGULATION. - Within twelve months of the date of the enactment of this Act, the Office of Federal Procurement Policy shall develop, and the Federal Acquisition Regulatory Council shall promulgate, in the form of a new regulation, a simplified form of contract to be used by agencies in the Federal Government for the acquisition of commercial products, as defined in section 401.

(1) The simplified contract shall contain terms used in the purchase and sale of commercial products, ie. standard terms taken from the Uniform Commercial Code. Such terms shall be used to the extent to which they are consistent with the needs of the Federal Government. Those clauses which are not required by law and which are not necessary for the purchase of commercial products shall be excluded; particularly when such clauses involve paperwork which has been determined bo be unnecessary for the purchase of such commercial products.

(2) Notwithstanding paragraph (1) of Section 304, the new form of contract shall not exclude any clauses which have been mandated for inclusion in other statutes which deal with procurement.

(b) Within twelve months of the enactment of this Act, the Office of Federal Procurement Policy shall develop and the Federal Acquisition Regulatory Council shall promulgate regulations, including revisions of current regulations, which state that:

(1) The regulatory exemption from the requirement for submission of cost or pricing or sales data from offerors, contractors, or subcontractors on the basis of adequate price competition shall be satisfied in commercial product procurement actions utilizing "competitive procedures," as defined in title 41 United States Code, Section 403, provided that the agency obtains responsive offers from two or more responsible offerors competing independently.

(2) For those commercial product procurement actions

which utilize procedures other than "competitive procedures" or for those instances where the procuring agency fails to obtain responsive offers from two or more responsible offerors competing independently. -

(A) The contracting officer shall determine if the price is reasonable based on price analysis, including comparison to the federal supply schedule price for the same product; or

(B) If a product is not on a federal supply schedule, the contracting officer shall determine the reasonableness of the proposed price according to the following order of precedence:

(i) The contractinf officer shall determine if the price is reasonable based on price analysis, including comparison to federal supply schedule prices for similar products;

(ii) If no federal supply schedule prices exist for similar products, the contracting officer shall perform market research and ascertain comparative market prices through established industry publications or other research sources for the same or similar products from competing vendors; or

(iii) If the contracting officer is unable to determine the reasonableness of the proposed prices after completing bona fide attempts to ascertain comparability of prices in the commercial or Government markets, the offeror, contractor, or subcontractor shall certify that the prices offered are prices based on established catalog or market prices for sales in significant quantities in the general public market.

(C) In determining the reasonableness a price under this paragraph (b), the contracting officer may make reasonable adjustment of prices so as to allow for the differing terms, conditions, products, and quantities set forth in the agency's procurement solicitation.

(3) In preparing for, or in conducting price negotiations, agencies of the Federal Government shall limit any requests for data submissions from offerors, contractors, or subcontractors to the directly pertinent sales data regarding general public market contracts; the terms and conditions of which are comparable to the contractual relationship that would exist in the contemplated Federal Government contract.

(c) Within twelve months of the date of enactment of this ACT, the Office of Federal Procurement Policy shall develop and provide policy guidance to Federal agencies empahsizing that the requirements which such agencies place upon offerors in the acquisition of commercial products shall be stated in the form of functional needs rather than in the form of design specifications.

(d) Nothing in this Section shall excuse an agency from complying with other statutes or regulations including those which require competition in Federal Government contracting.

SEC. 403. RESPONSIBILITIES OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, UNDER TITLE IV

Within six months of the promulgation of the regulations required by this Section, the Office of Information and Regulatory Affairs (OIRA) shall complete a review of the paperwork requirements pertaining to the acquisition of commercial products and shall report its findings and recommendations to the Office of Federal Procurement Policy, the House Committee on Government Operations and the Senate Committee on Governmental Affairs. Such review and report shall include examination of such paperwork requirements for consistency with the provisions of this Section.

United States General Accounting Office

GAO

Fact Sheet for the Honorable
Tom DeLay, House of Representatives

June 1989

PAPERWORK REDUCTION

Little Real Burden Change in Recent Years

GAO/PEMD-89-19FS

GAO

United States
General Accounting Office
Washington, D.C. 20548

Program Evaluation and
Methodology Division

B-233451

June 14, 1989

The Honorable Tom DeLay
House of Representatives

Dear Mr. DeLay:

In response to your letter of October 18, 1988, requesting information about the burden of federal paperwork on respondents, this fact sheet addresses four questions:

1. How has the paperwork burden changed over time?
2. What factors account for the observed changes?
3. Have some groups been differentially affected?
4. Have the reasons for data collection changed?

With respect to changes in burden, our analyses show a 27-percent increase in reported burden hours (to 1.9 billion) between 1980 and 1987. However, looking at the contributing factors suggests that most of this increase stems from changes in the way the Office of Management and Budget (OMB) accounts for burden.

These accounting procedures do not always reflect real changes in the amount of burden imposed on the public. For example, after the passage of the Paperwork Reduction Act of 1980, additional categories of information collection that had not been previously counted were included in OMB's figures. In other cases, OMB reestimated burden associated with large collections and reclassified major collections into special categories that have not been counted in reported burden. However, executive, legislative, and judicial actions led to instances of real reductions in burden. For example, paperwork burden associated with the Highway Safety Program within the Department of Transportation was reduced by 62 million hours. We also found instances of real increases in burden. For example, changes in the tax laws and regulations, together with changes in tax form use, resulted in real increases of 49 million hours on Form 1040.

An examination of burden according to who is asked to complete information requests showed little real change in burden for businesses but some increase in burden for nonbusiness respondents. Finally, reasons for data collection have changed somewhat. Our reanalyses of OMB's data suggest that while burden associated with regulation or compliance has increased by 3 to 4 percent, there has been a greater proportionate increase in the burden associated with application for benefits.

The sources for this fact sheet are OMB's annual Information Collection Budget (ICB) publications and its Reports Management System. The data are based on estimates of the paperwork burden of individual information collections that were developed by the collecting agencies and reviewed by OMB. Our analyses of these data have been augmented by information obtained from OMB's docket files on 10 case studies and by additional information provided by OMB's staff.

As agreed with your office, we did not obtain formal agency comments, and we plan no further distribution until 30 days after the issue date, unless you publicly announce the contents earlier. We will then send copies to others who are interested and make copies available to others who request them. Further information can be obtained by calling me at (202) 275-1854. This report was prepared under the direction of Lois-ellin Datta, Director of Program Evaluation in Human Services Areas (202) 275-1370.

Sincerely yours,

Eleanor Chelimsky

Eleanor Chelimsky
Assistant Comptroller General

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Abbreviations

DOD	Department of Defense
DOL	Department of Labor
FTC	Federal Trade Commission
GAO	General Accounting Office
HCFA	Health Care Financing Administration
HHS	Department of Health and Human Services
ICB	Information Collection Budget
IRS	Internal Revenue Service
OMB	Office of Management and Budget

Section 1

Background

Over the years, much concern has been expressed about the amount of time individuals and businesses are asked to spend responding to federal information collection efforts. At the beginning of the 1980's, two major steps were taken in an effort to control the burden of such information collection on the public: the Information Collection Budget process was established, and the Paperwork Reduction Act of 1980 was passed.

The ICB process was developed by the Office of Management and Budget under President Jimmy Carter in 1979-80 and was first implemented in 1981-82. The process works something like the fiscal budget. Agencies plan their information collection activities for the coming year and add up the resulting "paperwork burden" on the public in "burden hours."[1] OMB then reviews the agencies' information collection plans and the burden associated with them and establishes a burden-hour ceiling on each agency, which is intended to set a limit on the collections the agency can carry out.

The Paperwork Reduction Act of 1980 enhanced OMB's authority over information collections.[2] The act set specific goals for reductions in the ICB for fiscal years 1982 and 1983.[3] Under the act, agencies must submit individual information collections to OMB for approval before they are carried out or when a previous OMB approval has expired. OMB can approve such information collection requests, can disapprove them, or can require changes in the proposed collection prior to approval. Further reduction goals were set for fiscal years 1987-90 in the 1986 Paperwork Reduction Reauthorization Act.[4]

Despite these steps, and despite subsequent reports from OMB of substantial success in reducing paperwork burdens, congressional concern has been expressed recently about a large and apparently rising volume of business paperwork requirements. In this context, we were asked to describe changes in the volume of paperwork burdens, to identify factors contributing to those changes, and to describe changes in the populations affected by information collections and in the reasons for those collections.

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[1] According to OMB, "The measure of burden includes not only the time required to fill out a form, but also that necessary to read and understand the instructions, and to develop, compile and review the information requested." (Annual Information Collection Budget publication, Office of Management and Budget, Washington, D.C., 1986.)

[2] According to OMB, "Collections of information covered by the Paperwork Reduction Act include reporting requirements (e.g. report and application forms, schedules, and questionnaires), record-keeping requirements, disclosure and labelling requirements, and other similar requirements" (annual Information Collection Budget publication, Office of Management and Budget, Washington, D.C., 1988).

[3] The 1980 act requires the director of OMB to set a goal to reduce the existing burden of federal collections of information by 15 percent by the end of fiscal year 1982 and an additional 10 percent by the end of fiscal year 1983.

[4] The 1986 reauthorization requires the director of OMB to set a goal to reduce the existing burden of federal collections of information by an additional 5 percent in each fiscal year 1987-90.

Section 2

Data and Methodology

The sources for this fact sheet are OMB's annual Information Collection Budget publications and the Reports Management System, which is an administrative data base on federal information collections maintained by OMB. The paperwork burden data are based on estimates of the paperwork burden of individual information collections developed by the collecting agencies and reviewed by OMB.[1]

To augment our analyses, we conducted interviews with OMB staff to clarify questions arising from the examination of data on the Report Management System and ICB. We also selected 10 cases for further study. For these 10 cases, we selected the largest five increases and the largest five decreases in burden observed in the system data in 1985-87 for more detailed examination. We reviewed the system data on the history of each collection affected, and these data were clarified by interviews with OMB staff and an examination of docket files on these collections. We refer to these in the text as case studies and provide additional data on them in appendix I. The case study material is narratively presented in the text when information from one or more cases is important in understanding major changes in burden or when it clarifies the meaning of aggregated system data. This work was conducted according to generally accepted government auditing standards.

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[1] The accuracy of current estimates of the burden of information collections is not evaluated in this fact sheet.

Section 3

How Has the Total Burden of Federal Paperwork Changed Over Time?

The reported paperwork burden rose from 1.477 billion hours for fiscal year 1980 to 1.881 billion hours for fiscal year 1987, an increase of 27 percent (see figure 3.1).[1] The reported burden went as low as 1.275 billion hours in fiscal year 1982 but reached a peak of 2.023 billion hours in fiscal year 1983. It declined for several years after that but has never fallen to its pre-1983 level. The projected burden for fiscal year 1988 is 1.815 billion hours.

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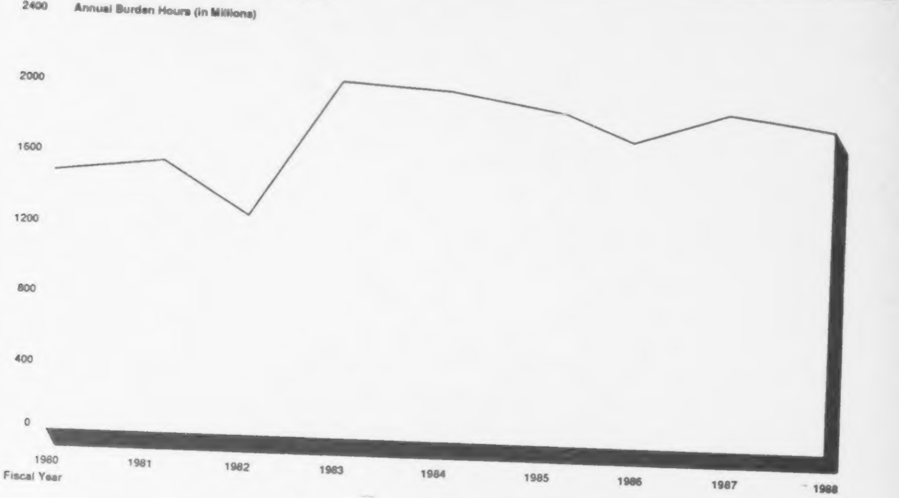
[1] The burden hour values (termed the "paperwork burden base") referred to in this section reflect the total paperwork burden reported at the end of each fiscal year as given in the annual Information Collection Budget publications OMB produced for fiscal year 1980 through and including fiscal year 1987.

Figure 3.1: Total Annual Burden Hours 1980-88[a]



[a] Values for fiscal years 1980 through 1987 are paperwork burden base values, calculated at the end of the fiscal year and reflecting the experience of that year. The 1980 value is a revised value and includes the burden of collections by agencies that were not included in the initial calculation of the 1980 base. The 1988 value is the paperwork allowance value, reflecting fiscal year 1988 information collection activity as anticipated at the end of fiscal year 1987.

Source: Information Collection Budget (ICB) Publications, Office of Management and Budget, Washington, D.C., 1980-87.

A conclusion from these data that the 1980 act and the ICB process have been ineffective in controlling paperwork burden is unwarranted. These yearly reports are not an accurate guide to changes in total paperwork burden. While legislative, executive, and (in at least one instance) judicial action has led to substantial real changes in paperwork burden over this period, the apparent changes in reported burden between 1980 and 1987 are largely attributable to changes in the way OMB accounts for federal paperwork burden. These accounting procedures do not always reflect real changes in the amount of burden imposed on the public.

Further, these changes are largely attributable to changes in a relatively small number of information collections. For instance, although more than 6,500 collections were active in 1985, and approximately the same number in 1987, 5 percent of them accounted for close to 95 percent of the total paperwork burden in each year, and changes in the burden of these large collections more than accounted for the net change in total burden between these two years.[2]

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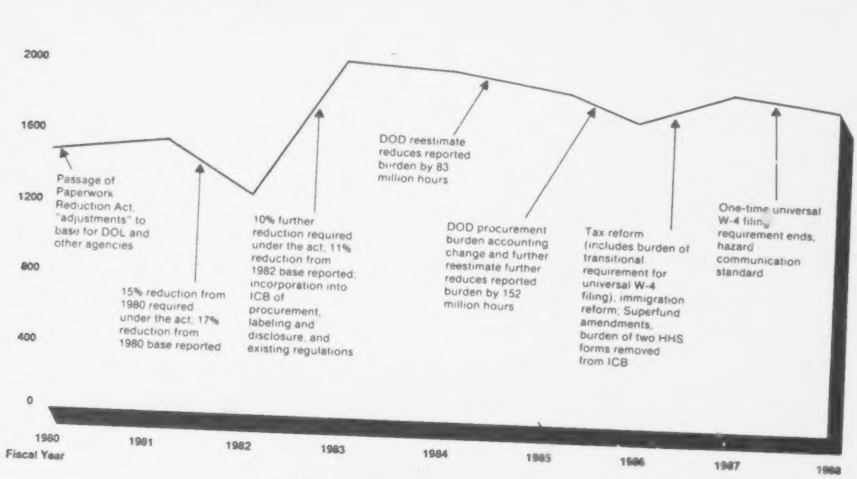
[2] These are years for which complete data are available. Between April 1985 and December 1987, total reported burden fell by 142 million hours. Although the burden attributed to the most burdensome 5 percent of all collections fell 152 million hours, from 1.836 billion hours to 1.684 billion hours, the burden attributed to all other collections rose nearly 10 million hours, from 101.8 million to 111.5 million hours.

Section 4

What Factors Account for the Observed Changes in Reported Paperwork Burden?

Year-to-year fluctuations in reported total burden are the result of many factors. Some of these changes have been the direct result of the passage of the Paperwork Reduction Act of 1980 and its implementation over a period of several years, while others simply reflect changes in burden accounting and represent no real reduction or increase in burden. Burden totals and events associated with them are indicated in figure 4.1.

Figure 4.1: Total Annual Burden Hours and Associated Events 1980-88[a]



[a] Values for fiscal years 1980 through 1987 are paperwork burden base values, calculated at the end of the fiscal year and reflecting the experience of that year. The 1980 value is a revised value and includes the burden of collections by agencies that were not included in the initial calculation of the 1980 base. The 1988 value is the paperwork allowance value, reflecting fiscal year 1988 information collection activity as anticipated at the end of fiscal year 1987.

Source: Information Collection Budget publications, Office of Management and Budget, Washington, D.C., 1980-87

Changes in Burden Accounting

Among the changes in burden accounting that have had a large effect on reported total paperwork burdens are (1) the inclusion of additional categories of information collection that had previously not been counted in the Information Collection Budget process, (2) reestimates of the burden associated with a number of very large information collections, and (3) other burden accounting changes, including the reclassification of some major information collections into special categories that have not been counted in many ICB statistics (such reclassification had affected collections totaling more than 200 million burden hours by the end of 1987) and the inclusion of individual preexisting information collections that had previously been omitted.[1]

Inclusion of Additional Categories of Information Collection

Under the 1980 act, three additional kinds of information collection were included in the paperwork burden base in fiscal year 1983: (1) requirements associated with government procurement of goods and services, (2) product testing and other actions associated with labeling and disclosure requirements, and (3) requirements contained in existing regulations. Primarily as a result of these inclusions, the total reported paperwork burden rose by 749 million hours (or by 59 percent) between fiscal year 1982 and fiscal year 1983.

Among the agencies most affected by these inclusions were the Department of Defense, where reported burden rose from 7.5 million to 629.4 million hours between fiscal year 1982 and fiscal year 1983, an increase of 622 million hours; the Department of Energy, where reported burden rose 77 million hours, from 11.7 to 88.3 million; and the Federal Trade Commission (FTC), where reported burden rose 39 million hours, from 0.4 million to 39.4 million. Because information was collected before these changes were instituted, these increases do not necessarily reflect real increases in burden. The accounting system was simply made more accurate by their inclusion.

Reestimates of Burden

In recent years, reestimates of the burden of major collections have had a considerable effect on total reported paperwork burden. For example, one reestimate of the burden of paperwork associated with Department of Defense procurement that was included in our case studies resulted in a reduction of 83 million hours in the estimated burden of such paperwork between 1984 and 1985, accounting for more than one fourth of the apparent decrease in the paperwork burden in fiscal years 1983-86.[2] A further reestimate of the burden of DOD procurement paperwork, also reflected in our case studies, was one contributor to a 163.5 million hour reduction in the reported burden of DOD information collections in the following year.

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[1] Examples of such reclassification are discussed below. They include Department of Health and Human Services (HHS) forms reclassified as government-wide standard forms and Department of Defense (DOD) procurement paperwork reclassified as part of the Federal Acquisition Regulation that was not counted in the burden of the regulation.

Other Burden-Accounting Changes

Other changes in burden accounting have also contributed to year-to-year changes in total reported burden. During the first years of the ICB process, many individual information collections were identified that had previously been omitted from OMB's records, although they fell into categories that had been included in OMB's burden accounting. When these collections were included in the paperwork burden base for the first time, OMB counted them as "adjustments." Although their inclusion added to total reported burden, it did not represent an increase in the real burden of information collection on the public. For example, between 1980 and 1981, almost 90 million hours in previously uncounted recordkeeping requirements and forms were added to the paperwork burden base of the Department of Labor (DOL). This "adjustment" alone more than explains the apparent increase in reported burden between fiscal year 1980 and fiscal year 1981.

Some previously existing collections have been added to OMB's burden accounts more recently, because of special circumstances. Another collection included in our case studies, the information collection for Regulation Z implementing the Truth in Lending Act, was added to the burden attributed to FTC only in late 1987. According to an OMB staff member, the collection had been in existence for some time but was not included in ICB earlier because FTC does not issue the regulation and several agencies are responsible for its enforcement. A consideration of which agency should include the hours in its ICB delayed the inclusion of the hours.

Other burden-accounting changes have reduced the burden reported in ICB. Since 1986, much of the DOD-related information collection activity previously counted under the Defense Federal Acquisition Regulation Supplement has not been counted in ICB (or reported in the Reports Management System).[3] Together with a reestimate of burden (referred to above) and a 12 million hour reduction in real burden, this accounting change explains the 163.5 million hour reduction in reported DOD burden between fiscal year 1985 and fiscal year 1986.

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[2] See appendix I for additional information.

[3] According to an OMB staff member, the burden of this activity was to be counted in the burden of the regulation. However, this burden has not actually been reported in either ICB or the system.

More recently, two HHS reporting forms were reclassified as "governmentwide forms" with "de minimis burden," reducing the paperwork burden attributed to HHS by 64 million hours.[4]

Changes in the Real Burden of Paperwork

There appear to have been some real changes in paperwork burdens since 1980.[5] During the initial years of the 1980 act, OMB reported substantial decreases in the burden attributable to the collections that had been included in the initial paperwork burden base of 1980—reportedly exceeding the act's goal of a 15-percent reduction by 1982 and a further 10-percent reduction by 1983 for collections included in that base. Among agencies reporting the largest reductions during this period were the Departments of Transportation, Treasury, and Agriculture; the Federal Communications Commission; and the National Credit Union Administration. Some of the major reductions cited in the annual ICB reports for this period were the elimination of the Department of Transportation's recordkeeping requirements associated with the Highway Safety Program (a reduction of 62 million hours), the elimination of prescribed procedures for federal credit unions (saving 67 million hours), a 31 million hour reduction in personal income tax reporting burden, reductions in recordkeeping requirements for the School Breakfast and School Lunch programs (21 million hours), and the elimination of the programing log for FM stations (17 million hours).[6]

More recently, while OMB reports further reductions in the real burden of some existing collections, there have also been increases in real burden because of new or expanded collections resulting from legislative, executive, and (in at least one instance) judicial action. Some of these are discussed more fully below.

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[4] According to an OMB staff member, this reclassification of two HHS forms was done at the request of HHS and was intended to reduce the effect of mandated percentage ICB reductions on an agency responsible for large collections with an irreducible burden, by excluding these collections from the paperwork burden base of that agency.

[5] OMB's distinction between "program changes" and "adjustments" is similar to our distinction between "real changes" and "burden accounting changes." However, OMB classifies as "adjustments" the "real changes" in the burden of information collections that result from changes in the size or behavior of the respondent population, not from governmental action changing the information collection.

[6] These examples of data reduction are drawn from OMB's annual Information Collection Budget publications for fiscal years 1982-84.

Factors Accounting for Changes in the Paperwork Inventory Between 1985 and 1987

To separate the effect of the initial implementation of the 1980 act from other changes in paperwork burden, we focused on the period from 1985 to 1987. Specifically, we compared the paperwork inventory on record on the Reports Management System in early 1985 with that of late 1987.[7] This comparison allows us to examine the effect of both real changes in information collection and continued changes in burden accounting on the magnitude and distribution of reported paperwork burden in recent years.

Overall Burden Changes

Between April 1985 and December 1987, paperwork burden dropped 7 percent, from 1.938 billion hours to 1.796 billion hours, for a net change of 142 million hours, shown in figure 4.2.[8]

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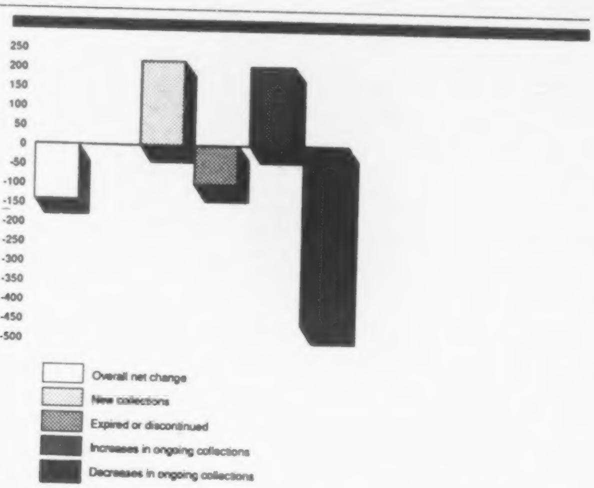
[7] Because the detail provided by the annual ICB publications is limited, and OMB's Reports Management System provides incomplete data on pre-1985 changes in the paperwork burden accounts, the analyses we present are limited to the period after March 1985.

[8] Burden hour values derived from the Reports Management System have been adjusted to avoid counting twice one major DOD collection that appears in duplicate on the system's records from March 1984 to September 1985.

Figure 4.2: Changes in Paperwork Burden Hours April 1985 to December 1987



Source: OMB Reports Management System, Office of Management and Budget, Washington, D.C., December 1987

The major components of the reported net change were

1. additional burden from new collections,

2. decreases in burden from the expiration or discontinuation of collections,

3. increases in the reported burden of ongoing collections, and[1]

4. decreases in the reported burden of ongoing collections.

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[1] "Ongoing" indicates that an information collection with the same docket file number was on OMB's inventory of active collections in both April 1985 and December 1987. In some cases, the collection associated with the docket file may have been extensively revised in the interim.

In each of these categories, a change in reported burden may represent either a change in burden accounting or a real change in paperwork burden.

Additional Burden From New Collections

Increases in burden resulting from the inauguration of new collections accounted for about 219 million burden hours between April 1985 and December 1987. Much of this increase appears to represent real change in paperwork burden. Among the major new information collections in this period were requirements for employment eligibility verification (one of the case studies reported in appendix I) and collections of information from aliens seeking to change their immigration status, both associated with immigration reform; new forms and requirements associated with the Tax Reform Act of 1986; and new reporting requirements in the Superfund Amendments of 1986.

Expiration or Discontinuation of Collections

Decreases in burden resulting from the termination of collections resulted in more than 100 million hours in burden reductions. Expiration or discontinuation of collections was indicated in the records for a large number of agencies. This does not include the redefinition of two major HHS collections as "governmentwide forms" not counted in ICB.[10]

Increases in the Burden of Ongoing Collections

Increases in the reported burden of ongoing collections totaled 207 million hours. An increase of 49 million hours (from 256 to 305 million hours) in the burden associated with Form 1040 accounts for nearly a quarter of this total. Altogether, increases in the burden of ongoing Internal Revenue Service (IRS) collections amounted to more than 90 million hours (this was partially offset by a 43 million hour decrease in the burden associated with other IRS collections). A court-ordered expansion of the Hazard Communication rule of the Occupational Safety and Health Administration accounted for a burden increase of about 34 million hours.

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[10] However, this value appears to include the expiration of some collections that had not really been eliminated. One case involves two Federal Trade Commission labeling collections with a combined burden of close to 30 million hours. They expired in September 1987 and had not been reinstated by December 1987. According to an OMB staff member, both of these collections were subsequently reinstated during the first half of 1988. Furthermore, the staff member indicated that the activity required by the collections continued between their expiration and their reinstatement. Thus the expirations had no real effect on burden.

Decreases in Reported Burden of Ongoing Collections

The largest contributor to the net change in reported total paperwork burden over this period was reductions in burden associated with ongoing collections. Such decreases totaled about 467 million hours. Of this, about 320 million is explained by changes in the burden attributed to a small number of procurement-related collections by DOD. However, about 81 percent of this appears to result from downward revisions in the burden estimates for particular collections and other burden-accounting changes, such as the reclassification of some procurement-related paperwork requirements and their omission from ICB.

OMB's ICB reports indicate that real reductions in DOD's annual paperwork burden ("reductions from base") totaled only 57 million burden hours in fiscal year 1985-87, although the net change in reported DOD burden (including all components of change) was a decline of 315 million hours.[11] This suggests that changes in burden accounting reduced DOD's reported paperwork burden by 258 million hours (315 million minus 57 million) between April 1985 and December 1987.[12] These changes include 151.5 million hours of the 163.5 million hour downward revision in the estimated burden of DOD collections, which was reported in the 1987 annual ICB publication. When these changes in burden accounting associated with DOD collections are considered, the remaining decreases in the burden of ongoing collections across all agencies add up to only 209 million hours. This figure includes decreases in the reported burden of ongoing collections for IRS (43 million hours), the Health Care Financing Administration (HCFA) (11 million hours), and the National Aeronautical and Space Administration (10 million hours).[13]

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[11] While the decrease in the reported burden of ongoing collections for DOD in this period was 319.7 million hours, the termination of DOD collections between 1985 and 1987 reduced burden by a further 0.8 million hours, and new collections and collections with increased burden gave rise to 5.8 million hours in burden increases, for a net change in reported DOD burden of (−319.7 million − 0.8 million + 5.8 million hours) = −314.7 million hours.

[12] The value of 57 million hours in real DOD paperwork reductions in fiscal years 1985 through 1987 is used here as an approximation to the value of real DOD paperwork reductions from April 1985 to December 1987, which was not available. The annual ICB publications show a decrease of 299 million hours in DOD paperwork burden for fiscal years 1985 through 1987, including 237 million hours in burden accounting changes.

[13] Reductions in burden for these and other agencies may also include some burden accounting changes, so that 209 million hours is an upper limit on the magnitude of real burden reduction for ongoing collections in this period.

Estimated Net Change in Burden Between April 1985 and December 1987

The net decrease in reported burden between 1985 and 1987 seems to reflect changes in burden accounting rather than a real reduction in the burden of information collections. When these changes in burden accounting are considered, there appears to have been a net increase in real federal paperwork burden over this 32-month span. In particular, adjusting the 142 million hour net reduction in reported burden to account for the approximately 258 million hour effect of changes in burden accounting on DOD's reported burden yields a net increase of about 116 million hours over this period.[14] Because increases and decreases in ongoing collections were roughly equal, the net increase appears to be attributable to new information collections, which have had a greater burden than was saved by the termination of some existing collections.[15]

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[14] This assumes that the net effect on reported burden of all non DOD changes in burden accounting between April 1985 and December 1987 is small.

[15] Of the 466.8 million hour decrease in burden from ongoing collections shown in figure 4.2, approximately 258 million hours are explained by the changes in DOD burden accounting already discussed, so that the adjusted decrease in the burden of ongoing collections is approximately (466.8 − 258) = 208.8 million hours, while the increase in burden from other ongoing collections is 206.6 million hours.

Section 5

Have Some Groups Been Differentially Affected?

Groups Defined

Information collections by the U.S. government affect different groups, singly or in combination: businesses, individuals and households, state and local governments, farms, and nonprofit institutions. OMB's Reports Management System does not indicate the proportion of the burden that is borne by each respondent group for collections that affect more than one respondent group.

We have divided all collections into four groups based on their respondent groups or affected populations: (1) collections affecting only businesses, (2) collections affecting both businesses and one or more other groups, (3) collections affecting only individuals and households, and (4) all other collections.[1]

Apparent Changes

Between April 1985 and December 1987, paperwork inventories appear to show sharp changes in the distribution of paperwork burden across the populations affected (see table 5.1). While the burden of the collections that affect both businesses and other groups fell by more than 800 million hours, the burden associated with business-only collections rose by nearly 300 million hours. At the same time, the burden of collections addressed only to individuals rose more than 370 percent from 92 million to 434 million hours.

Table 5.1: Unadjusted Distribution of Burden in Paperwork Inventory by Populations Affected April 1985 to December 1987[a]

Population affected	1985		1987		Net change from 1985
	Hours	Percent	Hours	Percent	
Business	342.6	18%	630.5	35%	+288.0
Business and others[b]	1,445.3	75	644.0	36	−801.3
Individuals and households	91.8	5	433.7	24	+341.9
All other[c]	57.9	3	87.3	5	+29.4
Total[d]	**1,937.6**	**100%**	**1,795.5**	**100%**	**−142.0**

[a] All values are unadjusted and in millions of annual burden hours

[b] Includes collections affecting both business and individuals as well as collections affecting both business and "other" groups

[c] "Other" groups include farms, state and local governments, and nonprofit institutions. A small number of federal government collections are also counted

[d] Totals may not equal the sums across rows because of rounding

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[1] OMB refers to the respondent groups as "affected publics." "All other" collections include all those that affect neither individuals nor businesses. They also include collections that affect both individuals and one or more other respondent groups but not businesses. Collections affecting both individuals and businesses are counted as "business and other."

Inconsistencies in Data on Populations Affected

However, these raw figures may be misleading. In many cases, the affected populations associated with a particular information collection on the Reports Management System were revised between 1985 and 1987. For instance, Form 1040 (which accounted for 13 percent of all reported paperwork burden in 1985 and 17 percent in 1987) was described as affecting businesses and other groups as well as individuals in 1985, whereas in 1987 it was described as affecting only individuals. Case study data compiled on another IRS collection provided an additional instance in which business was listed as an affected population at one point in time but not at another (see appendix I). An OMB staff member reported that these changes stemmed from variation in reporting rather than any real change in the affected population.

The largest procurement-related DOD collections were classified as affecting both businesses and other groups (including individuals and state and local governments) in 1985. In 1987, they were described as affecting only businesses. According to an OMB staff member, these inconsistencies arose from changes in the interpretation of the coding categories. For example, since these collections all involved procurement, everyone who was the affected public was in a business relationship with DOD in terms of these data collections. Therefore, a reinterpretation of the coding category may have led to the change.

However, some collections described as affecting only businesses in 1985 were described as affecting both businesses and other groups in 1987. Some examples are HCFA's Uniform Hospital Bill, the Education Department's Student Aid Report, and the Hazardous Material Shipping Papers of the Department of Transportation.

In some cases, real changes in the character of particular information collections may have made these changes in description appropriate. However, it appears likely that in most cases the resulting reclassifications do not reflect a major change in the real character of the respondents but instead reflect inconsistency in labeling over time. Therefore, we have recalculated the number of burden hours attributed to collections with specific respondent groups, under the assumption that the respondent groups associated with any particular collection did not change between April 1985 and December 1987. If a collection was described as pertaining to one set of affected populations in 1985, and the same collection was described as pertaining to a different set of affected populations in 1987, we have assumed that the later description was correct in both periods. If the affected populations assigned to specific collections in 1987 were also used to classify the collections in

1985 for all collections that were active in both years, the changes in the distribution of burden between the 2 years appear much more modest, as indicated by table 5.2.

Table 5.2: Adjusted Distribution of Burden in Paperwork Inventory by Populations Affected April 1985 to December 1987[a]

Population affected	1985		1987		Net change from 1985
	Hours	Percent	Hours	Percent	
Business	905.5	47%	630.5	35%	−274.9
Business and other	613.2	32	644.0	36	+30.8
Individuals and households	353.2	18	433.7	24	+80.5
All other	65.6	3	87.3	5	+21.7
Total[b]	**1,937.6**	**100%**	**1,795.5**	**100%**	**−142.0**

[a] All values are adjusted to 1987 classifications and are in millions of annual burden hours

[b] Totals may not equal the sums across rows because of rounding

Little Real Change in Paperwork Burden on Business

The adjusted figures from the April 1985 and December 1987 paperwork inventories in table 5.2 do appear to show some changes in the distribution of paperwork burden across respondent groups or affected populations. According to these figures, there were substantial declines in the burden of collections from businesses. The reported burden of business-only collections fell by 275 million hours, while the burden of other collections affecting business rose by only 31 million hours, for a net decline in business-related collections of 244 million hours. The share of total reported burden explained by collections affecting businesses fell from 78 to 71 percent.

However, these adjusted values may still overstate the real change in the distribution of paperwork burden between 1985 and 1987. In particular, the net decline in business and others of 244 million hours is quite close to the 258 million hour decline in DOD information collections (primarily procurement-related and business-oriented) attributable to burden accounting changes, as described earlier. If these accounting changes are considered, it appears that the real paperwork burden on business actually changed very little over the 1985-87 period: the burden of all collections affecting businesses may have risen about 14 million hours, or 1 percent over that period.[2]

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[2] If the two large FTC information collections that expired earlier in 1987 and were formally reinstated in the first half of 1988 (see footnote 10 in section 4) are added to the reported burden for December 1987, then the paperwork burden of collections affecting business rose about 3 percent from 1985 to 1987.

Increase in Paperwork Burden on Nonbusiness Respondents

At the same time, there were larger increases in this period in the burden of information collections addressed to nonbusiness respondent groups. Most notably, there was an increase of more than 80 million hours in the paperwork burden of collections addressed only to individuals, which accounted for 18 percent of all reported burden in 1985 and 24 percent in 1987. This appears to primarily reflect increases in the paperwork burden of tax collection forms. Also contributing to this increase were the new paperwork requirements associated with immigration reform that affected aliens seeking changes in immigration status.

Summary

Information collections affect a variety of respondent groups. While the total real burden of information collection rose slightly between 1985 and 1987, not all groups were equally affected. After adjusting for burden accounting changes and for apparent inconsistencies in OMB's labeling of populations affected by collections, we found that there seems to have been a very small net increase in the real burden of information collections on businesses and a more substantial increase in the real burden on individuals and other respondent groups. These increases are largely attributable to tax and immigration reform.

Section 6

Have the Reasons for Data Collection Changed?

Reasons or Purposes for Collections

OMB has classified information collections according to the general reason or purpose for the collection. The categories include (1) "regulatory or compliance" (embracing most tax forms, as well as collections associated with regulatory enforcement and a variety of other information collections), (2) respondents' applications for benefits, (3) research, evaluation, or statistical collections, and (4) program planning or management.[1] A small number are simultaneously placed in more than one category.

Apparent Changes in Purposes of Collections

Much as with the distribution of burden by affected populations, the raw figures show considerable changes in the distribution of burden across purposes between April 1985 and December 1987 (see table 6.1). The data appear to show a large increase in the burden of regulatory and compliance collections—more than 408 million hours, or nearly 40 percent of the 1985 base. At the same time, they seem to show a dramatic decline of about 183 million hours, or more than 40 percent, in the burden associated with application for benefits and an even more startling decline of 380 million hours—more than 90 percent—in the burden associated with research, evaluation, and statistical collections.

Table 6.1: Unadjusted Distribution of Burden in Paperwork Inventory by Purpose April 1985 to December 1987[a]

Purpose	1985		1987		Net change from 1985
	Hours	Percent	Hours	Percent	
Application for benefits	413.8	21%	230.4	13%	−183.3
Research, evaluation, and statistics	419.5	22	38.9	2	−380.6
Regulatory or compliance	1,064.5	55	1,472.9	82	+408.4
Program planning or management	33.4	2	29.4	2	−4.0
Other or multiple purposes	6.4	<1	23.9	1	+17.5
Total[b]	**1,937.6**	**100%**	**1,795.5**	**100%**	**−142.0**

[a] All values are in millions of annual burden hours

[b] Totals may not equal the sum across rows because of rounding

Inconsistencies in Classifications

However, once again, we found that the classification of some large ongoing collections, as well as many smaller collections, had been changed on the Reports Management System between April 1985 and December 1987. A change in reported purpose was associated with 4 of the case study collections (see appendix I). Three of these 4 were defense procurement collections that were described as either evaluative or related to applications for benefits in 1985 and as either regulatory or compliance-related in 1987.

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[1] OMB accounts separately for research, evaluation, and general statistical purposes of collections, but the three have been counted together for the analysis presented here.

An OMB staff member indicated that there appeared to be not a substantive change in the collections that accounted for the change in purpose for the DOD collections but, rather, a change in interpretation of the coding categories. For example, a possible rationale suggested for classifying some of the collections as evaluations was that they were intended to evaluate the contractors or the products. Another collection may have been considered related to application for benefits because it pertained to requirements that had to be met for the contractor to get paid by the government. Subsequently, it was suggested, they may have viewed the same collections as implementing required rules and regulations and therefore classified them as regulatory or compliance collections.

As noted before, changes in the classification of collections may have been appropriate in some cases. However, these examples suggest that such changes in classification often reflect inconsistency in labeling over time. Therefore, we have again followed the procedure of assigning 1987 characteristics consistently to collections that existed in both 1985 and 1987. That is, if a collection was described as having one purpose in 1985, and the same collection was described as having a different purpose in 1987, we have assumed that the later description was correct in both years.

Adjusted Data Show Different Trends

The adjusted data on trends in the purposes of collections are given in table 6.2. These are in sharp contrast with the unadjusted data above, which showed a decline in the burden of applications for benefits, a rise in the burden of regulatory and compliance collections, and a fall of more than 90 percent in the burden of research, evaluation, and statistics collections. According to the adjusted figures, there was a substantial increase in the burden of applications for benefits—about 60 million burden hours, or 36 percent, over the 1985 base. The burden of regulatory and compliance collections fell by 210 million hours, or 12.5 percent of the 1985 base, while the burden of research and related collections fell by only 9 million hours, or 19 percent.

Table 6.2: Adjusted Distribution of Burden in Paperwork Inventory by Purpose April 1985 to December 1987[a]

Purpose	1985		1987		Net change from 1985
	Hours	Percent	Hours	Percent	
Application for benefits	169.2	9%	230.4	13%	+61.2
Research, evaluation, and statistics	48.2	2	38.9	2	−9.2
Regulatory or compliance	1,683.3	87	1,472.9	82	−210.4
Program planning or management	31.4	2	29.4	2	−2.1
Other or multiple purposes	5.4	<1	23.9	1	+18.5
Total[b]	**1,937.6**	**100%**	**1,795.5**	**100%**	**−142.0**

[a] All values are adjusted to 1987 classifications and are in millions of annual burden hours.

[b] Totals may not equal the sums across rows because of rounding.

Real Changes in Burden Distribution

However, the real change in the distribution of burden may not be reflected by these figures either. If the previously described decline of roughly 258 million hours in the burden of defense procurement that is explained by burden-accounting factors is taken into consideration, there seems to have been a small net increase in the real paperwork burden of regulatory and compliance collections over this period (about 48 million hours, or 3 percent of the 1985 burden of these collections). There have also been real increases in the burden of applications for benefits. New or expanded collections associated with applications for benefits have included employment eligibility verification and applications for immigration status changes.[2]

Summary

Inconsistencies in identifying the purpose of collections have to be corrected in order to compare the real changes in reasons for information collection. While regulatory or compliance-related collections accounted for most of the burden of information collection in both 1985 and 1987, the greatest proportionate increase in real burden was for collections associated with application for benefits.

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[2] In addition, the "Notification of Oil or Hazardous Discharge" under title III of the Superfund Amendments and Reauthorization Act of 1986 was listed as an application for benefits under the Reports Management System. However, this appears to be an erroneous classification. If this collection, with about 14 million hours in 1987, is instead classified as a regulatory or compliance collection, the real increase in the burden of such collections is about 62 million hours, or 4 percent.

Ten Case Studies

Agency or department and title of collection[a]	OMB file number	Date of action	Burden hours[b]	Change of burden hours[c]	Type of change[d]	Affected population[e]	Type and purpose[f]
DOD							
In support of DOD acquisitions	0704–0187	September 30, 1985	100	−83	A	I, B, SLG[g]	New: evaluation[h]
Acquisitions Management Systems and Data Requirements	0704–0188	September 30, 1985	189	−29	R	I, B, SLG[i]	Revised: benefits[j]
Defense Acquisition Regulations	0704–0189	September 30, 1985	15	−173	A	I, B, SLG, F	Extension: evaluation
Defense Federal Acquisition Regulations	0704–0193	June 30, 1986	0	−166	A	B[k]	New: evaluation[l]
FTC							
Regulation Z truth-in-lending	3084–0088	October 22, 1987	19	+19	A	B	Extension: regulatory or compliance
Justice							
INS employment eligibility verification (1-9)	1115–0136	May 18, 1987	25	+25	R	I, B, SLG, F	New: benefits
Labor							
OSHA Hazard Communication	1218–0072	October 23, 1987	35	+34	R[m]	B	Reinstated: regulatory or compliance
Treasury							
IRS Employees Withholding Allowance (W-4)	1545–0010	October 14, 1986	95	+88	R	I, B, SLG, NP[n]	Revised: regulatory or compliance
Individual Income Tax (1040)	1545–0074	September 22, 1986	290	+31	A	I[o]	Revised: regulatory or compliance[p]
Employees Withholding Allowance (W-4)	1545–0010	October 6, 1987	14	−66	R	I[o]	Revised: regulatory or compliance

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[a] This table shows the ten largest changes in burden resulting from individual actions on information collection requests between April 1985 and December 1987.

[b] Burden hours are reported in millions of hours. Hours vary on different action dates if they have prior or subsequent record. This is the collection that brought the case into the sample, so events are taken as before or after this point in time.

[c] Additions to burden hours are indicated by "+", reductions by "−".

[d] "A" is for accounting changes; "R" is for real burden changes.

[e] Populations affected for this action date. Abbreviations are I = individuals; B = business; SLG = state and local governments; NP = nonprofits; F = farms. Changes are explained in footnotes.

[f] Type and purpose for this action date, as recorded in Reports Management System data.

[g] In 1986, the population affected changed to business only.

[h] In 1987, the purpose changed to regulatory or compliance.

[i] In 1987, the population affected changed to business only.

[j] In 1983, the purpose was coded as an evaluation. In 1987, the purpose changed to regulatory or compliance.

[k] In 1984-85, the population affected was individuals, businesses, and state and local governments. The collection was not in the Reports Management System June 30-October 6, 1986. When it went back into the system on October 7, 1986, the population affected was business only.

[l] In 1986, the purpose changed to regulatory or compliance.

[m] Of the 34 million additional hours, 29 million were real burden changes and 6 were accounting changes.

[n] Nonprofits were added to the list of affected populations. In 1984 only, farms were also listed.

[o] The population affected has changed almost every year. In 1982 it was individuals, businesses, and farms. One submission in 1983 dropped farms; the next two submissions in 1983 listed only individuals. In 1984, it added businesses and farms, which were dropped again for this submission. Later in 1986, businesses and nonprofits were added, and in 1987 it went back to individuals only.

[p] The purpose is coded as regulatory or compliance, but it was coded as a benefit from August to October 1983.

[q] The population affected changed earlier in 1987 to individuals only, dropping businesses, state and local governments, and nonprofits.

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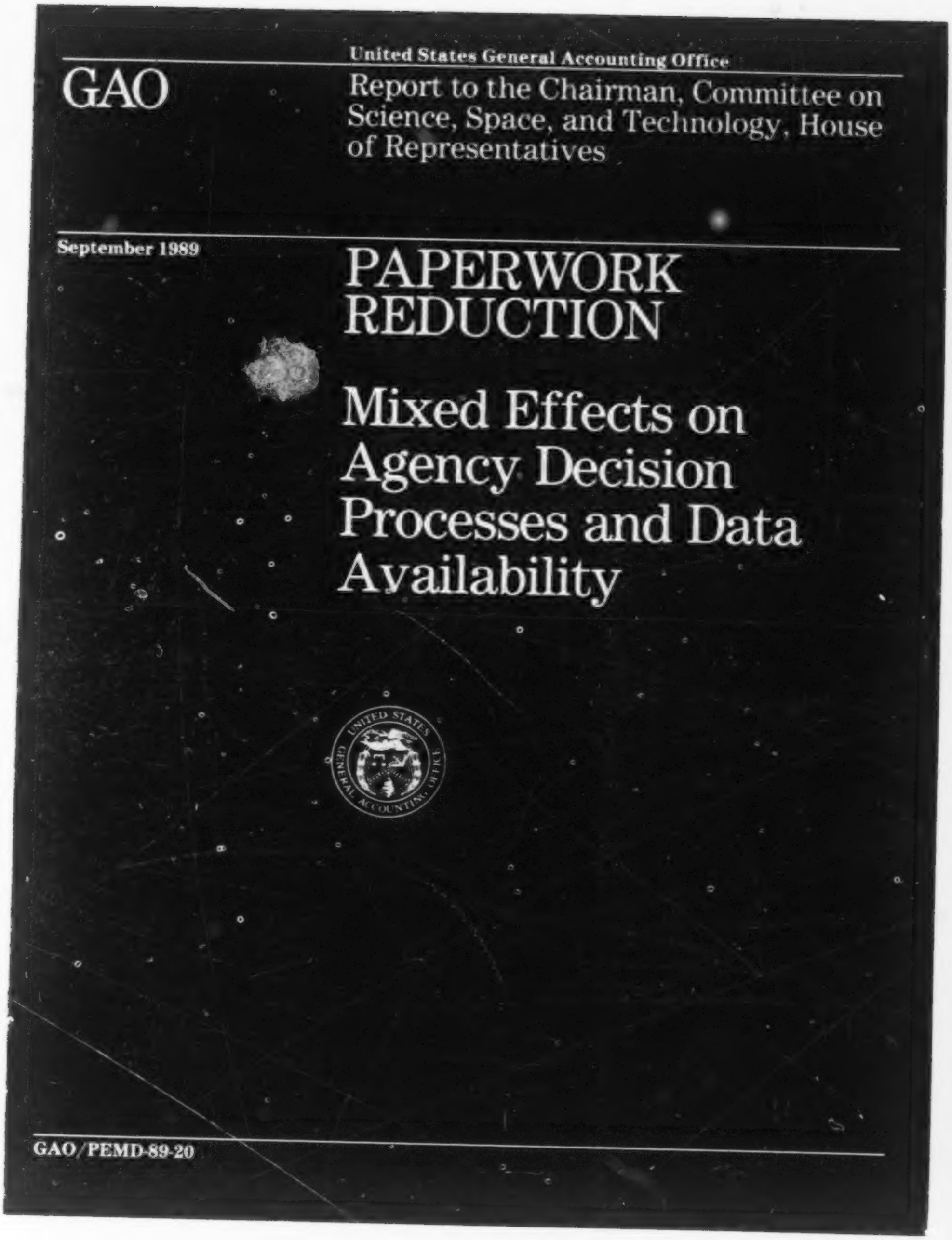

United States General Accounting Office

GAO

Report to the Chairman, Committee on Science, Space, and Technology, House of Representatives

September 1989

PAPERWORK REDUCTION

Mixed Effects on Agency Decision Processes and Data Availability

GAO/PEMD-89-20

GAO
United States
General Accounting Office
Washington, D.C. 20548

Program Evaluation and
Methodology Division

B-233451

September 7, 1989

The Honorable Robert A. Roe
Chairman, Committee on Science,
Space, and Technology
House of Representatives

Dear Mr. Chairman:

In response to a request from your committee, we are submitting this report on federal efforts to control the amount of information that is gathered from the public. In particular, this report examines (1) how and how well data collection requests are handled within the Office of Management and Budget (OMB), (2) the influence of the OMB review process on agencies' decisions to collect information, and (3) the likely consequences of OMB and agency actions on the availability of data. This report contains recommendations for achieving a better balance between the need to collect data and the need to control the paperwork burden on the public.

As we arranged with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of the report. At that time, we will send copies to the Office of Management and Budget and all departments and agencies covered by our review, and we will make copies available to others upon request. Please call me on 202-275-1854 if you need further information. This report was prepared under the direction of Lois-ellin Datta, Director of Program Evaluation in Human Services Areas (202-275-1370). Major contributors are listed in appendix V.

Sincerely yours,

Eleanor Chelimsky

Eleanor Chelimsky
Assistant Comptroller General

Executive Summary

Purpose

Last year, Americans devoted nearly 2 billion hours to complying with federally sponsored requests for information. Substantial concern has been raised about the effect of efforts by the Office of Management and Budget (OMB) to minimize the burden these requests place on the public. The House Committee on Science, Space, and Technology asked GAO to (1) review OMB's handling of agency requests for data collection and the timeliness and technical adequacy of the reviews; (2) determine how OMB's policies and practices influence agencies' decisions to gather information, particularly nonstatistical agencies; and (3) assess the influence of agency and OMB actions on the availability of information.

Background

Over the past four decades, the Congress has enacted a number of laws to control the burden on the public, businesses, and state and local governments of complying with federal information requests. In particular, the last major legislative effort, the Paperwork Reduction Act of 1980 (44 U.S.C. 3501), requires approval of all federal data collection involving 10 or more respondents. The act also instituted the Office of Information and Regulatory Affairs within OMB, which reviews all the information collection requests that federal agencies submit. Although reducing unnecessary paperwork burden remains a high priority, concern has been expressed about the balance between reducing burden and ensuring that sufficient information is available to monitor program operations and to perform other functions such as scientific research.

Results in Brief

OMB has developed a formal process for reviewing a large volume of information collection requests, but GAO found inconsistent application of its policies by office staff. Despite these inconsistencies, the vast majority of submissions were approved, and only a small fraction were formally modified. Nontechnical concerns accounted for the majority of the reasons given for disapprovals. The great majority of submissions were reviewed and acted upon within the legal time limits. However, in recent years, the median time for reviews has increased, and the number of exceptionally time-consuming reviews has quadrupled. Further, some submissions that were approved by OMB GAO found technically inadequate, and some technically adequate submissions were disapproved. (See pages 20-40.)

Agencies' decisions about information collection requests have been influenced by OMB's policies and practices. The submissions of a substantial fraction were almost always approved by OMB; in large measure, these agencies have established systematic review procedures. For such agencies, an OMB review may be duplicative, adding delays without any real benefit. A small fraction of agencies have had persistent problems obtaining OMB's approval. These problems sometimes resulted from factors such as differences of opinion between OMB and agency staff about the type of information that should be collected. (See pages 41-47.)

Agency and OMB actions have been associated with a reduction in the availability of information since the early 1980's. Some reductions were positive in the sense that data that officials believed unnecessary have been discontinued. However, OMB's policies and practices appear to have been associated with a reduction in the availability of certain types of information—sometimes referred to as a "chilling effect"—from some agencies. In particular, agencies with low approval rates showed greater reductions in submissions, particularly submissions for new and research-oriented data collections. (See pages 48-61.)

Principal Findings

How Requests Are Handled in OMB

Between 1982 and 1987, OMB received over 20,000 information collection requests from 211 federal agencies. While OMB has established a formal review process, its policies have not been consistently applied by office staff. Informal procedures were used to determine if information requests were duplicative, written technical guidelines were rarely used, and the criteria for determining priority of reviews varied among staff. Part of the variation in practices may stem from the fact that new staff received little or no on-the-job training, and most have had minimal training in areas needed to judge the technical merits of an information collection request. (See pages 21-27.)

Despite variability in the actual review process, 95 percent of the submissions were approved. Twelve percent of the research approvals were accompanied by formal modifications, while 8 percent of the nonresearch approvals were formally modified. An unknown percentage were informally modified in negotiations between OMB and the agencies. Failure to demonstrate the practical utility of a collection and lack of need for a collection were the major reasons reported for disapprovals. (See pages 27-30.)

About 7 percent of the agencies have had persistent difficulties in obtaining OMB's approval. Some difficulties stem from the quality of the submissions, but in other cases they appeared to stem from differences of opinion between OMB and the agency on what type of data should be collected. However, GAO found that many agencies had nearly perfect approval rates. (See pages 30-31.)

The great majority of submissions were reviewed and acted upon within the time limits specified by the Paperwork Reduction Act of 1980. However, the median time for reviews increased by 41 percent between the early 1980's and 1987. Some of this difference appeared to be attributable to practices OMB developed in 1987 in response to congressional concern over how to encourage public comment in the review process. Further, there has been a 25-percent increase in the number of submissions exceeding the 60-day review period, and the number of submissions in review over 90 days, although small, has quadrupled in recent years. Contrasting GAO's technical reviews of 17 submissions with OMB's decisions on these submissions showed that OMB approved 7 of 10 proposals that GAO found technically inadequate. Technical inadequacies GAO identified included low expected response rates, the potential for response bias, underreliance on conventional sampling methodology, and inadequate questionnaire design. (See pages 33-40.)

OMB's Influence on Agencies' Decisions to Gather Information

OMB's regulations and guidelines have had a heavy influence on the processes used by agencies to make information-gathering decisions. These decision processes varied across agencies. Agencies that had developed systematic procedures for deciding what data to collect had also adopted strategies of review to ensure the technical quality of their submissions. In addition, experience with OMB had resulted in agencies' giving greater attention to new data collection activities, and in some cases agencies had drawn OMB into the decision process earlier through informal presubmission contacts. Finally, nearly half the managers GAO interviewed stated that one or more aspects of their information collections were negatively affected by OMB's reviews. (See pages 41-47.)

Agency and OMB Influence on Information Availability

Together, the OMB clearance process and agency responses to it appear to have had mixed influences on the likely availability of federally sponsored information. In some cases, agency officials believed unnecessary data were eliminated. However, some nonstatistical agencies had reduced their data collection activities because of difficulties in obtaining OMB's approval. Overall, those nonstatistical agencies that had difficulty in obtaining OMB's approval for information collections submitted 20 percent fewer requests in recent years. (See pages 49-53.)

The "chilling effect" of difficulties stemming from the OMB clearance process has resulted in 3 to 8 percentage point differential reductions (for regulatory and nonregulatory agencies, respectively) in new submissions for these agencies. GAO also estimated that these same agencies experienced differential declines of 14 and 23 percentage points for research-oriented submissions. (See pages 53-56.)

Recommendations

GAO recommends that the director of OMB employ existing authority to delegate primary review responsibility to senior officials within designated agencies that have demonstrated internal review capability. The performance of these agencies could be monitored through spotchecks conducted by OMB. OMB should assist executive agencies with less-effective internal mechanisms for procedural and technical review in improving those mechanisms. OMB should enhance its guidance and assistance to agencies in improving the efficiency and quality of their data collections through increased use of sampling procedures, measures to enhance response rates and control response bias, and the more precise design of data collection instruments. In addition, the director of OMB should develop an ongoing training program for its paperwork review staff to ensure that technical and nontechnical criteria are appropriately and consistently applied to submissions. Also, the director of OMB should augment the capacity of the Office of Information and Regulatory Affairs to perform technical reviews of new and recurrent collections. Measures appropriate to this end may include the expansion of technical staff and consultation with external experts. Further, OMB should review information collection requests concurrently with the public comment period for these requests.

Agency Comments and GAO's Response

Commenting on a draft of this report, OMB concurred with all GAO's recommendations but challenged four points in the report. GAO does not agree that these challenges are supported by available evidence. (See appendix IV and chapter 6.)

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Abbreviations

FILS	Federal Information Locator System
GAO	General Accounting Office
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
SF-83	Standard Form 83, Request for OMB Review

Chapter 1

Introduction

Each year, nearly every adult American fills out at least one federally sponsored form, survey, or questionnaire. In fiscal year 1988, the general public, members of farm and business communities, and representatives of state and local governments spent almost 2 billion hours meeting federal information collection requirements. Over the past four decades, the Congress has expressed concern about the amount of time citizens and small business owners are asked to spend responding to federal information collection efforts. As a result, several laws have been enacted in an effort to control the burden the federal government imposes on the public. Of these, the Federal Reports Act of 1942 and the Paperwork Reduction Act of 1980 are the most significant.

The Federal Reports Act of 1942 (December 24, 1942, ch. 811, 56 Stat. 1078) requires that the government collect its information with a minimum burden on the public and at a minimum cost to the government. It authorized the Bureau of the Budget—which became the Office of Management and Budget (OMB) in 1970—to determine whether the collection of information by a federal agency is necessary for the agency's proper performance or for any other proper purpose.

In the years since 1942, federal paperwork has continued to grow. Congressional legislation, presidential initiatives, agency regulations, and research efforts have all contributed to this trend. Moreover, according to OMB, the Congress by 1979 had exempted over 80 percent of the federal paperwork burden from the 1942 act's clearance process. For example, independent regulatory agencies were exempted from OMB's review in 1973, although they were subject to GAO's review.

In reaction to the continued growth of federal paperwork, the Congress enacted the Paperwork Reduction Act of 1980 (Public Law 96-511; 44 U.S.C. 3501). The act supplanted the Federal Reports Act of 1942, extended the process enacted in 1942 to a wider range of information collection reviews, and established broad objectives for improving the management of all federal information resources. A stated goal was to minimize the paperwork burden on the public and maximize the utility of the information collected by the federal government.

The broad objectives of the 1980 act included (1) reducing the information burden imposed on the public by the federal government; (2) lowering the costs of collecting, managing, and disseminating information by federal agencies; (3) ensuring that federal agencies collect only as much information as they need and can use effectively; (4) eliminating inconsistencies among federal information policies by promoting uniformity wherever possible; (5) improving the efficiency of government programs and minimizing the public burden through the effective use of automatic data processing and telecommunications; and (6) ensuring that the legitimate privacy and confidentiality of individuals and enterprises are safeguarded.

OMB's Responsibilities

To achieve its objectives, the 1980 act established the Office of Information and Regulatory Affairs (OIRA) within OMB and gave it authority over federal information functions, including general information policy, reduction of paperwork burden, federal statistical activity, records management activities, the privacy and security of records, agency sharing and dissemination of information, and the acquisition and use of automatic data processing and telecommunications and other information technology for managing information resources.

Information Policy

OIRA's most sweeping statutory mandate was to develop comprehensive information policies for the entire federal government. The 1980 act specified six tasks for OMB in this regard:

1. the development, implementation, and oversight of uniform information resources management policies and guidelines;

2. the initiation and review of proposals for legislation, regulations, and agency procedures to improve information management;

3. the coordination, through budget review and other means, of agency information practices;

4. the promotion of greater information sharing among agencies through the federal information locator system (FILS), the review of budget proposals, and other means;

5. the evaluation of agency information management practices; and

6. the oversight of planning and research regarding the federal collection, processing, storage, transmission, and use of information.

The act also gave OMB deadlines for many of these assignments. In 1983, we reported that while a significant portion of OIRA's resources were devoted to regulatory review activities, and emphasis had been placed on paperwork burden reduction, only limited progress had been made in such areas as information policy, statistics, and the management of information resources.[1]

Paperwork Control

The Paperwork Reduction Act is most closely identified with OMB's paperwork control review process, by which OIRA's desk officers determine

> "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency." (44 U.S.C. 3504(c)(2))

The basic requirements of the process are simple. OMB reviews all activities of executive branch and independent regulatory agencies that collect information from 10 or more persons, whether they are voluntary or mandatory. This includes collections for a range of purposes such as application for government benefits, reporting or recordkeeping requirements, and statistical surveys, all of which may occur in a variety of forms, including questionnaires and telephone surveys. Agencies are expected to ensure that (1) the collection is the least burdensome necessary for the proper performance of the agency's ability to comply with legal requirements and to achieve program objectives; (2) the collection does not duplicate information otherwise accessible to an agency; (3) the collection of information has practical utility; and (4) the cost to the agency for collecting, processing, and using the information is minimized.

Information collection requests submitted to OMB typically include a statement of justification (addressing each of 15 questions posed by OMB to guide the adequate description of the proposed data collection), a copy of the data collection instrument, and a copy of the form that formally requests approval for the collection from OMB (the Standard Form 83, or SF-83, reprinted in appendix II). The agency also must submit other relevant documentation such as regulations or statutes mandating data collection necessary to justify the need for the data to be collected, and may submit additional relevant documentation.

OMB's paperwork control functions do not end with paperwork clearance. The 1980 act also requires OMB to inventory all information collection activities; designate agencies to collect information for other agencies in order to reduce duplication; set goals for the reduction of the burdens of federal information collection activities; oversee the completion of action on the recommendations of the Commission on Federal Paperwork; design and operate FILS, in order to control duplication by providing an inventory of information collected by federal agencies; and report annually to the Congress regarding paperwork reduction efforts.

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[1] U.S. General Accounting Office, Implementing the Paperwork Reduction Act, GAO/GGD-83-35 (Washington, D.C.: April 20, 1983).

The 1980 act also instructs OMB on the review of paperwork requirements emanating from regulations that executive agencies propose. OMB may review these regulations when agencies issue a notice of proposed rulemaking in the Federal Register. The results of OMB's review are to be treated as public comments that become part of the agency's rulemaking record and are considered by the agency as it drafts the final regulation. When the final rule is published in the Federal Register, the agency must explain how it has responded to OMB's comments.

OMB's paperwork responsibilities include one other dimension, the information collection budget. First proposed by OMB under President Carter and implemented in fiscal years 1981-82, the budget works something like the fiscal budget. Agencies plan their information collection activities for the coming year and add up the resulting "paperwork burden" on the public (measured in burden hours). OMB then reviews the agencies' information collection plans and the burden associated with them and establishes a burden hour ceiling on each agency that sets a limit on the collections the agency can carry out. OMB may also suggest particular cuts in information collections that would allow an agency to meet burden reduction goals.[2]

The 1980 act sets specific goals for an overall reduction in the burden from existing information collections of 15 percent by the end of fiscal year 1982 and another 10 percent by the end of fiscal year 1983. OMB set further goals for reductions in fiscal years 1984, 1985, and 1986. The Paperwork Reduction Reauthorization Act of 1986 called for an additional 5-percent decrease in the burden imposed by existing collections for each fiscal year between 1987 and 1990.

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[2] The same OIRA staff members who review individual information collection requests are also responsible for carrying out OMB's role in the process. Commenting on a draft of this report, OMB officials noted that the information collection budget is not binding and that OMB imposes no sanctions on agencies that exceed their negotiated budget ceilings. These officials view the budget as a planning document.

Concern About OMB's Role

There was considerable ambiguity, prior to our review, about how OMB handles information collection requests, although anecdotes abound regarding OMB's deficiencies in treating individual requests. For example, concerns have been raised about the limited technical abilities of OIRA's staff,[3] delays associated with unnecessarily protracted reviews,[4] disapprovals of information collection requests that appeared to be motivated by political rather than technical or practical grounds,[5] and OMB's overemphasis on burden reduction and its insufficient attention to the value of proposed data collection efforts.[6] OMB officials had taken the positions that agencies collect more information than is needed for national policymaking and that the federal government should not be in the business of producing information products and services that could be provided by the private sector.[7] With few exceptions, these claims and counterclaims have not been systematically investigated.

Observers have also argued that the paperwork review process has had subtle, adverse influences on executive departments and agencies. In particular, individuals have contended that in response to OMB's policies and practices, federal departments and agencies have stopped submitting requests or have devised ways of circumventing the review process entirely.[8] Some of these circumvention strategies have reduced the quality of information that is collected. The extent to which these practices occur has not been systematically addressed, however.

Objective

In response to these concerns, the chairman of the House Committee on Science, Space, and Technology asked us to answer the following questions. (1) How are agency requests for data collection handled within OMB? On what grounds—methodological or other—are data collection instruments modified or disapproved? Is OMB executing its responsibilities in a timely and technically adequate fashion? (2) How do OMB's policies and practices affect agencies' decisions regarding requests to gather information, particularly in nonstatistical agencies? (3) What influence have agency and OMB actions had on the availability of information?

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[3] M. Kritz, "Kibitzer with Clout," National Journal, May 30, 1987, p. 1407.

[4] "OMB Slows Up AIDS Survey," OMB Watch, Eye on Paperwork Action Alert, March 1989.

[5] Letter of transmittal to the report entitled "OMB Review of CDC Research," to the Subcommittee on Oversight and Investigation, House Committee on Energy and Commerce, September 1986, pp. iii and iv.

[6] K. Wallman, "Losing Count: The Federal Statistical System," No. 16, Population Reference Bureau, Inc., September 1988, p. 1.

[7] C. DeMuth, from an interview with Ann Crittenden, New York Times, July 11, 1982, n.p. See also D. Ginsburg, address before the Information Industry Association, n.p., September 20, 1984, pp. 4 and 19.

[8] Kriz, "Kibitzer with Clout."

Scope and Methodology

We answered the committee's questions by multiple methods summarized in table 1.1. In order to answer the first question—How are data collection requests handled in OMB?—we used four data collection methods. First, using OMB's reports management system, we constructed a longitudinal data base of the universe of information collection requests agencies submitted to OMB between 1982 and 1987. This provided evidence on OMB's overall performance, including the volume of submissions handled, approval rates, reasons for disapprovals and modifications, the duration of OMB's review, and other descriptive information regarding the information collection requests submitted by federal government agencies.[9] As requested, we paid particular attention to the experiences of nonstatistical agencies, both regulatory and nonregulatory.

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[9] For the purposes of this report, the term "agency" refers to any unit that is assigned a unique four-digit agency code in OMB's reports management system. A list of all such units that actually submitted information collection requests between 1982 and 1987 appears in appendix I.

Table 1.1: Our Study Questions and Methods Used to Answer Them

	Question	Method
1.	How are data collection requests handled in OMB?	— Analysis of information collection request data —Interviews with OMB officials responsible for paperwork clearance — In-depth review of a sample of recent information collection requests (case examples) — Expert reviews of the technical adequacy of a sample of recent information collection requests (case examples)
2.	How do OMB policies and practices influence agencies' decisions to collect information?	— Interviews with agency paperwork officials regarding policies and procedures for the development of information collection requests —In-depth review of a sample of recent information collection requests (case examples)
3.	How have OMB and agency actions influenced the availability of information?	— Analysis of information collection requests from a sample of agencies — Interviews with agency and OMB officials

Second, we interviewed a sample of 19 OMB officials responsible for paperwork clearance at various levels (desk officers, statistical policy analysts, assistant branch chiefs, and branch chiefs) to determine what happens to a data collection request once it enters OMB (who sees it, where it goes in the agency, and so on). In these interviews, we asked about the formal and informal procedures and criteria used to assess the data collection requests and the training required for this job.

Our third method involved an in-depth look at 17 recent submissions (or case examples). Here, we selected a sample of research, evaluation, and statistics information collection requests that OMB had reviewed in 1987. The focus of these investigations was the processes associated with the OMB review. The sample represented various types of research-oriented information collection (new versus previously collected, both statistical and nonstatistical) as well as differing dispositions (such as approved, modified, and disapproved).

Fourth, we convened a panel of experts to assess the technical adequacy of the submissions included in our case examples. (They are listed in appendix III.) The experts' decisions and rationale for those decisions were compared with the results of OMB's review of the corresponding submission.

In answering the second question—How do OMB's policies and practices influence agencies' decisions regarding requests to collect information?—we used two methods. Our first method involved semistructured interviews with officials from a representative sample of 50 agencies. Specifically, using our longitudinal data base of the universe of actions, we selected a stratified random sample of 50 agencies based on agencies' current and prior experiences with the OMB's review process.

We classified agencies according to their relative success at obtaining approval from OMB and changes over time. The categorization resulted in five types of agencies. The types were agencies with (1) low approval rates (less than 90 percent) in both the early (1982-84) and late (1985-87) periods, (2) a low approval rate in the early period but a high rate (over 90 percent) in the later period, (3) a high approval rate in the early period and low in the later period, (4) high approval rates in both periods, and (5) limited experience with the paperwork clearance process. Within each of the first four categories, agencies were classified as having regulatory, nonregulatory, or statistical missions.

We completed interviews with 17 paperwork clearance officers responsible for 38 of the 50 agencies in our sample. We also interviewed a subsample of 17 agency managers. The purpose of these interviews was to understand the paperwork development policies and procedures in each of the agencies and the perceptions of these agency officials as to how the paperwork clearance process has affected data collection decisions. We collected documents, when they were available, describing policies and practices within agencies.

Our second method involved the 17 case examples described above. Here we examined more closely the development and submission of these collections within the agencies.

In order to answer the third general question—How have agency and OMB actions influenced the availability of information?—we used two methods. First, using the data in the reports management system for our sample of 50 agencies, we examined the submission practices of the agencies over time. Of particular interest were the changes in the types of submissions (research, evaluation or statistics, application for benefits, regulatory or compliance, and so on) made by statistical and nonstatistical agencies and by agencies with high and low approval rates over time. Second, we coupled this information with information from the interviews with agency managers and clearance officers, as well as the interviews with OMB's desk officers and managers and additional interviews for the case examples, regarding the likely effects of the actions of agencies and OMB on the availability of information.

Strengths and Limitations of the Study

Our study design contains several methodological strengths and at least one limitation. With regard to its strengths, unlike prior reports on OMB's practices, our longitudinal assessment provides a basis for examining changes over time. Further, we selected our samples to represent the diversity of experiences that agencies have had in their interactions with OMB. Thus, we are able to describe the prevalence of problems and strengths in the review process.

Finally, we used at least two different methods to answer each of the committee's questions. This strategy has several benefits. First, each method provides data on different aspects of the same process. For example, the longitudinal data used to describe the actions of OMB or agencies provides evidence on general trends. Interviews with agency officials provide complementary information on how the trends may have come about, and the in-depth study of particular cases generates evidence on the processes that may be at work. While each source of evidence, by itself, contains limitations, when all are used in concert, they yield a more complete, objective, and balanced answer to the complex questions we have been asked.

Our study design does contain a limitation. Namely, we have been asked to assess how OMB influences agencies' decisions to collect data and to ascertain the joint influence of agency and OMB actions on the likely availability of information. Many forces result in changes in organizational practices. Our design cannot account for the influences of them all. In discussing answers to our questions, we describe where appropriate influences as plausibly associated with the actions of OMB or agencies.

Report Organization

Chapters 2 and 3 provide answers to the committee's first question. In chapter 2, we describe the formal and informal process by which information collection requests are handled within OMB, outcomes of the review process, and the criteria used in making decisions to approve or disapprove a request. In chapter 3, we present our findings on the timeliness and technical adequacy of OMB's reviews. Chapter 4 presents our findings on the second question. That is, it examines the influence of OMB's paperwork review policy and practice on agencies' decisions to collect data. Chapter 5 presents our findings on the third question. Here we examine how OMB and agency actions have influenced the availability of information. In chapter 6, we offer conclusions and recommendations for achieving a reasonable balance between the need to collect data and the need to control the federal paperwork burden on the public.

Chapter 2

How Requests to Collect Information Are Handled in OMB

Since the enactment of the Paperwork Reduction Act in 1980, OMB has annually received from federal agencies between 3,000 and 4,000 requests for approval to collect information from the general public, businesses, states, and localities. Over 200 federal departments and agencies have submitted requests (they are listed in appendix I). To handle this volume of submissions, OMB has implemented regulations for submitting information collection requests. It has also developed a formal process for soliciting input on each request, reviewing submissions, deriving decisions, and notifying the agencies of its actions.

Although a seemingly orderly and formal review process has been developed, the main OMB reviewers, the desk officers, rely on a variety of informal practices that affect decisionmaking on individual requests. Further, although one of the main reasons for centralizing the review process within OMB was to ensure that information was not duplicative, the majority of desk officers we interviewed stated that they did not use or there were limitations in using the Federal Information Locator System to check for duplication.[1] Rather, personal experience or contacts with other desk officers served as the basis for making this determination. Part of the variation in review practices appears to stem from the fact that new desk officers received little on-the-job training, and most desk officers had minimal training in areas needed to judge the technical merits of an information collection request, such as methodology.

Although practices varied across desk officers, the outcomes of the review process were fairly predictable. Most submissions (93-95 percent) were approved, while a small fraction of these (8-12 percent of those we sampled) were ultimately modified as a result of the review process. Those that were disapproved were most often questioned on the grounds that their practical utility had not been established or that the collection was not necessary for the agency's proper performance.

This portrait suggests that the OMB review process is relatively straightforward and represents a minor obstacle for federal agencies. The overall picture, however, masks at least two important areas of concern: a small number of agencies have had persistent difficulties in securing approval to collect information and new submissions, in particular new submissions directed at research, evaluation, or statistical data collection, were considerably more likely to be disapproved or withdrawn than were other types of submission.

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[1] The Paperwork Reduction Act of 1980 mandated the creation of Federal Information Locator System to provide data on existing federal data collections for the purpose of ensuring that proposed data collections do not duplicate information already available to the federal government and for providing public access to data. The system that was established in 1983 was in operation until September 1988. However, OMB reports that it and other agencies had problems with the earlier version of FILS of insufficiency in identifying likely duplications. OMB is currently implementing the requirement for a FILS through enhancements to OMB's reports management system.

Volume of Requests

As seen in table 2.1, over 20,000 submissions were received from 211 federal agencies between 1982 and 1987. The majority (67 percent) of the information collection requests came from 72 major regulatory agencies (for example, the Federal Trade Commission). Major nonregulatory agencies (for example, the Centers for Disease Control or the Human Nutrition Information Service) accounted for about 25 percent of the submissions, while 8 agencies whose primary mission is to gather statistical information accounted for 6 percent of the submissions to OMB. Fewer than 3 percent of the requests came from a group of about one third of the agencies, agencies that submitted a small number of requests over the 6-year period covered by our review.

Table 2.1: Number of Information Collection Requests 1982-87

		Type of submission				
		Recurrent[a]		New		
Agency type	Number of agencies	Number	Percent	Number	Percent	Total
Regulatory	72	10,015	73%	3,773	27%	13,788
Nonregulatory	56	2,959	59	2,097	41	5,056
Statistical	8	669	59	463	41	1,132
Other[b]	73	306	59	215	41	521
Total	**211**	**13,949**		**6,548**		**20,497[c]**

[a] We use the term recurrent submissions to refer to those that were previously approved and subsequently submitted for an extension, revision, or reinstatement.

[b] All agencies submitting fewer than 10 information collection requests in 1982-84 or submitting more than 10 in 1982-84 but submitting none in 1985-87.

[c] Excludes 28 preliminary plans and 1 unclassified action.

Table 2.1 also shows that for other than regulatory agencies, about 60 percent of submissions entailed reapproval of ongoing or previously approved collections for which an extension, revision, or reinstatement was being requested. We refer to these collectively as recurrent collections. For regulatory agencies, nearly 75 percent of the submissions were for reapproval of existing data collections.[2]

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[2] Not all collections labeled new in OMB's administrative data were in fact new. Some had been previously approved more than 3 years ago and were therefore treated as new collections. Others, particularly in 1982-84, were ongoing collections that had not previously required OMB's clearance.

The Review Processes

Interviews with OIRA personnel and an examination of formal and informal guidelines for reviews reveal a general logic and organization of the paperwork review process. Although practices have changed over time and differ among OIRA staff, figure 2.1 schematizes how information collection requests are handled within OMB.

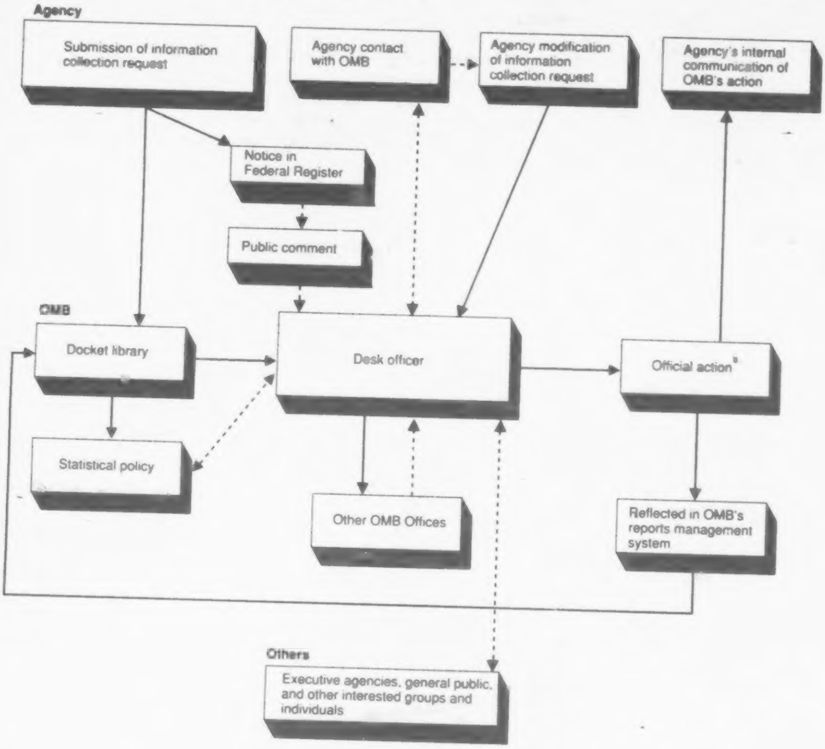
The OMB review process begins when an agency submits a request (composed of an SF-83 Form and accompanying documentation) to the public docket library within OIRA (appendix II contains a copy of an SF-83). Simultaneously, the submitting agency issues a notice in the Federal Register stating that OMB's approval is being sought. This is intended to provide the public with an opportunity to comment.

The docket library serves as the main distribution point, houses current requests, and maintains the report management system, which contains information on all actions involving information collection requests. For ongoing or recurrent data collection efforts (for example, the Census Bureau's Survey of Income and Program Participation), the system contains a history of all submissions and actions on them.

According to OMB's procedures and our interviews with OMB's staff, information collection requests are distributed within 2 to 10 days to the desk officer who is assigned to the originating agency and to the office of statistical policy. The desk officer has primary responsibility for reviewing the submission package. This includes consulting OMB's records of this data collection (for example, of prior submissions) and may include checking the Federal Information Locator System and the agency's information collection budget. They also may solicit input from other sources within OMB and outside it, clarify questions with the agency, and summarize any public comments OMB receives. The desk officer makes a recommendation on whether the submission should be approved and on the duration of the approval period. The Paperwork Reduction Act stipulates that information collections can be approved for a maximum of 3 years.

Under OIRA's practices, who makes the final determination on a particular submission depends on several factors. The immediate supervisor of a desk officer, an assistant branch chief, and the branch chief have authority to approve a request. However, large submissions, those involving a million burden hours or more, must be approved by the deputy administrator or a delegate. A recommendation to disapprove a submission must be authorized by a branch chief. Furthermore, desk officers are instructed to inform their branch chiefs of any collection

Figure 2.1: OMB's Information Collection Review Process[a]


Agency
Submission of information collection request
Agency contact with OMB
Agency modification of information collection request
Agency's internal communication of OMB's action
Notice in Federal Register
Public comment
OMB
Docket library
Desk officer
Official action[b]
Statistical policy
Other OMB Offices
Reflected in OMB's reports management system
Others
Executive agencies, general public, and other interested groups and individuals

[a] Solid lines indicate events that always occur, dotted lines indicate events that sometimes occur.

[b] An appeal process that is available through the deputy administrator when new information is available but is rarely invoked.

that "appears to warrant review." Highly sensitive matters go to the deputy administrator. After OMB's formal action, the agency is notified in a written "notice of action," and the submission is retained in the docket library.

The Paperwork Reduction Act of 1980 allows OMB 60 calendar days to complete its review of a submission. With proper notification to the agency, this review period may be extended to 90 calendar days. However, the implementing regulations stipulate that if OMB has not acted, upon the 91st day of review the agency can request and shall receive approval. However, under these circumstances, the maximum approval period is 1 year.[3]

Variation in Practices

OIRA employs approximately 35 desk officers to handle between 3,000 and 4,000 submissions each year. As seen in figure 2.1, these staff are the "front line" of the OMB review process. How they approach paperwork review depends on the characteristics of the particular agencies they are assigned and their individual backgrounds, styles, and preferences. Interviews with a sample of 15 desk officers revealed considerable variation in their (1) use of written guidelines, (2) use of consultation with different groups for input, (3) use of criteria for prioritizing submissions, and (4) informal practices.

Use of Written Guidance and Consultations

OMB has issued implementing regulations for the Paperwork Reduction Act, has developed statistical policy circulars, and has recently issued an information collection review handbook for desk officers. The latter was available only in draft form when we were interviewing desk officers. All 15 desk officers we interviewed relied on the act or the implementing regulations for guidance on administrative and procedural issues.

Eight of the 15 indicated that they augmented these sources by referring to the draft handbook, other memos, or other OIRA staff, the last being reported as the most frequent means of augmenting written guidance. While 11 of the 15 desk officers were familiar with the draft handbook, only 6 had read it or consulted it as part of their work. With respect to technical issues (such as survey design), only 3 of the 15 desk officers reported that they relied on statistics texts or the statistical policy circulars. Eight of those interviewed cited consultation with the office of statistical policy as their primary basis for technical guidance, and 4 also relied on personal training and experience.

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[3] One of the case example interviews indicated that agencies were reluctant to request this type of approval from OMB; furthermore, no instances of their being considered or requested were mentioned.

Input From Others

Desk officers are also responsible for obtaining information on incoming requests from relevant groups inside and outside OMB. They varied in the amount and extent of contact they reported having with these groups. In a typical month, the desk officers had about 65 to 70 contacts with such groups. About half (55 percent) of the contacts were with agency staff concerning active submissions; across desk officers, the percentage varied from 30 to 85 percent. In most cases, contacts with others inside OMB accounted for 5 to 10 percent of monthly contacts.

There was a great degree of variability in this activity from one desk officer to the next. For example, while 10 percent of monthly contacts were with the office of statistical policy, this ranged from a high of 20 percent for 1 desk officer to little or no contact, less than 5 percent, for 7 other desk officers. Further, while 10 percent of monthly contacts were with private parties outside OMB (for example, lobbyists, users, state representatives), across desk officers this percentage ranged from a low of 1 percent to slightly over 40 percent of all contacts. Differences in the collections proposed by different agencies were partially responsible for the variation in practices we observed. However, comments derived from our interviews suggest that much of this variation stemmed from stylistic differences between the desk officers.

Setting Priorities

Most desk officers are assigned to multiple agencies and may receive many submissions at the same time. Therefore, desk officers frequently have to decide which paperwork reviews to give top priority. When asked about the criteria they use in determining priorities among submissions, most desk officers indicated that they used various rules of thumb.

For 8 of 15 desk officers, information collection requests entailing new data collections were given priority, while 6 (40 percent) focused on submissions that involved large public burden. Four of the desk officers reported using both of these criteria while 5 used neither. The staff also reported using a variety of other criteria or combinations of criteria. For example, 4 desk officers reported giving priority to controversial submissions. In one instance, this was the sole criterion offered. Three desk officers indicated that they established their priorities on the basis of the track record of the agency's submissions. In general, 10 of the desk officers relied on two or fewer factors in prioritizing their reviews. While 2 very experienced staff (15 years with the agency) offered four or more bases for prioritization, there was no overall tendency for staff with 3 or more years of tenure to rely on multiple criteria or provide a differentiated rationale for prioritization. Two desk officers could offer no rules of thumb that were used to give priority to reviews in OIRA.

Informal Practices

Most of the desk officers we interviewed offered a variety of informal rules of thumb in response to our interview questions on informal paperwork review practices. Six desk officers mentioned something about the nature of submissions that influenced the way they handle requests. For example, 1 desk officer's rules of thumb followed a series of questions like "Does it [the request] answer the SF-83 questions?" "Does it [the request] make sense?" and "How will the data be gathered?" Other such practices relied on various internal OMB resources (8 responses), including consultation with colleagues, guidance from superiors, consultation with others in OMB (such as budget examiners) and the use of handbooks. Other rules of thumb included the use of external contacts, reliance on public comments (2 desk officers), and personal style (3 desk officers), including reliance on common sense, experience, or "looking for compromises."

Training

Of the desk officers in OIRA, 16 had been trained in public policy or public administration, 6 were trained in economics, 5 in law, and 4 in business. The remainder were educated in environmental policy (2), international relations (2), history (1), sociology (1), and American studies (1). Twenty percent held either a law degree or a Ph.D. and 83 percent held at least a master's degree.

Most of the desk officers we interviewed (12 of 15) reported receiving no formal on-the-job training. One respondent characterized orientation to the job as a "sink or swim" process. However, there was mention of briefings—on changes in regulations, for example—as a primary source of on-the-job training.

Despite the lack of formal on-the-job training, the majority of the desk officers (11 of 15) thought that their educational background prepared them well for the demands of the job. Individual desk officers stated that they had been trained in economics or had "two graduate level statistics classes" as part of their master's programs. In identifying inadequacies in their educational backgrounds, desk officers mentioned lack of training in survey design and principles of public administration. Several other desk officers remarked that formal academic training was less important than experience and common sense.

Turnover of Desk Officers

Turnover of desk officers at OMB was mentioned by agency and OMB officials as affecting the review process. We performed several analyses to get an indication of the extent of this turnover. We found that

- 17 percent of the desk officers had less than 1 year at OMB,
- 33 percent had 1-3 years of experience at OMB, and
- 50 percent had 4 or more years of experience at OMB.

While years spent at OMB gives some indication of overall office turnover, it does not reflect the changes that occur when desk officers are assigned to different agencies or when other changes occur in their responsibilities, such as a change from a desk officer to a staff policy position, all of which result in a new person being responsible for the collections from a particular agency. For our sample of 50 agencies, we found that 68 percent had 3 or more primary reviewers during 1982-87. That is, for most of the agencies we examined, there is a considerable chance that desk officer turnover will occur between consecutive reviews of recurrent submissions; approvals are granted for only up to 3 years.

Desk officer turnover was also seen in our case illustrations. In 13 of the 17 cases (76 percent), turnover occurred either prior or subsequent to action on the case.

OMB's Formal Actions

The outputs of the OMB review process were more predictable than the process that generated them. The great majority of submissions since 1982 (94 percent) have been approved. Further, as shown in table 2.2, the approval rate has increased somewhat from about 93 percent during the early years of implementation of the act to 95 percent in recent years. Similarly, the disapproval rate has declined from 4.5 percent in the early years to slightly more than 3 percent more recently. The remainder of the actions were withdrawals by the agency or decisions by an independent regulatory commission to override an OMB action.

Table 2.2: OMB's Actions on Information Collection Requests

Action	1982-84	1985-87[a]	Total
Approval[b]	93.2%	95.0%	94.0%
Disapproval[c]	4.5	3.1	3.8
Withdrawal[d]	2.4	1.9	2.1

[a] Actions through December 22, 1987. Excludes 438 information collection requests pending on that date, independent regulatory commission overrides, and OMB rulings that specific information collection requests were not subject to OMB review.

[b] Includes emergency approvals.

[c] Includes disapprovals with continuation.

[d] Includes withdrawals with continuation.

With regard to reasons for the decline in disapprovals, several desk officers noted that one of the consequences of the act, and its regulations, and contact with OMB is to provide agencies with a clearer understanding of the review process, thereby reducing the number of inappropriate submissions. This interpretation is consistent with the data on reductions in the number of withdrawals. However, increased presubmission contact between some agencies and their desk officers could also be associated with the small decline in the number of withdrawals and disapprovals.

OMB's Modifications

OMB can approve a request or approve it with required modifications. Analysis of remarks recorded in the report management system for 423 research, evaluation, and statistics approvals and 422 other, nonresearch-oriented approvals shows roughly 12 percent of research-oriented submissions that were approved and 8 percent of nonresearch approvals were accompanied by formal modifications. Some of these were seemingly minor changes such as requiring an expiration date on a form or indicating that the collection is voluntary. However, some have been more extensive: about 20 to 27 percent of the submissions that were formally modified had one or more questions deleted, and 7 to 8 percent had questions added. Ten to 14 percent had changes made in their respondent population or sampling plan, and 1 to 2 percent had the frequency of collection reduced.

Overall, a relatively small fraction of approvals were accompanied by major modifications described in the reports management system files. However, basing an analysis on this source alone would understate the frequency and extent of modifications required by OMB. First, 3 percent of nonresearch approvals and nearly 10 percent of research-oriented approvals were accompanied by references in the system to a discussion elsewhere (for example, in an accompanying letter or in an earlier conversation) of unspecified conditions or modifications. From the reports management system alone, it is impossible to evaluate the nature of these conditions, and therefore they have not been included in our count of formal modifications.

Second, OMB and the submitting agency may agree on changes in a collection during the course of other formal reviews that are not indicated in the reports management system. Third, OMB may have previously disapproved the collection while indicating the changes that would make it acceptable. If the agency incorporates these changes prior to resubmission, the system record is likely to show an approval without modifications. Similarly, if an agency consults informally with OMB prior to submitting a collection, it may receive guidance on changes in the collection that OMB would like to see made before submission; if the agency makes the changes, the system may not indicate these modifications. Evidence from the case examples suggests that OMB may shape information collections at least as much or more through these mechanisms as through the formal conditions of approval recorded in the system.

Although we did not directly assess the extent to which these alterations improved or impaired these submissions, information obtained in our case studies suggests that agency officials believe these modifications generally improve the quality of the submission or reduce the amount of respondent burden. Formal and informal modifications have, however, delayed the review process.

Reasons for Disapprovals

We examined the remarks recorded in the reports management system for all 481 disapprovals of information collection requests on record in 1982-84 and all 301 on record in 1985-87. As shown in table 2.3, the most common reasons given for disapprovals were that proposed collections lacked practical utility or were not necessary for proper agency performance.

Table 2.3: Reasons for Disapprovals of Requests[a]

Reason	1982-84	1985-87	1982-87
Practical utility	23%	35%	28%
Not necessary	22	19	21
Deficient justification package	22	13	18
Procedural problems	18	14	17
Not specified[b]	14	21	16
Burden	13	15	14
Technical issues	10	17	13
Other	9	8	9
Duplication	5	9	7
Burden estimation	7	5	6
Cost or funding issues	1	4	2
Total number of reasons	**690**	**480**	**1,170**
Total number of disapprovals	**481**	**301**	**782**
Reasons per case (means)	1.4	1.6	1.5

[a] Percentages in each column add up to more than 100 because more than one reason was offered for some disapprovals.

[b] Not specified in remarks entered in the reports management system. Disapproval may have been explained in a separate letter or memorandum sent to the agency.

Source: OMB reports management system remarks file.

Deficiencies in the supporting statement, justification package, or procedures (as when an information collection was submitted before the rule underlying it was approved or an agency failed to provide sufficient public notice of the proposed collection) were frequent among reasons given for disapprovals in 1982-84 but were somewhat less frequent in 1985-87. This may reflect increased experience of agency personnel with the procedural and formal aspects of the paperwork review process. Actual or possible duplication was cited as a reason for disapprovals in fewer than 1 case in 10. And excessive burden was explicitly raised as an issue in only a modest fraction of disapprovals (although a major reason for disapproving collections that lack practical utility or that are viewed as unnecessary is presumably to prevent avoidable paperwork burdens).

Not only were research, evaluation, and statistics collections more likely than others to be disapproved, but the grounds for their disapprovals were somewhat different. Issues of practical utility and possible duplication as well as technical issues were more frequently cited in disapprovals of these collections, while procedural problems and questions about burden estimates were more likely to adversely affect other types of collections.

Duration of Approvals

Although OMB is permitted to approve information collections for a period of up to 3 years, many collections are approved for substantially less than 3 years. Nearly 67 percent of new collections for research, evaluation, or statistical purposes (research-oriented collections) have been approved for less than 2 years, and 14 percent of such collections have been approved for less than 6 months. Recurring and nonresearch-oriented collections had a greater probability of being approved for more than 2 years, but even among approved recurring nonresearch-oriented collections, about 5 percent were approved for less than 6 months.

In some cases, OMB may approve a collection for a short period because of reservations about the collection. It may not wish to halt an ongoing collection abruptly, but it may insist on changes in the collection or a better justification for the collection as a prerequisite for any further extension of the approval. However, in other cases, the agency itself may propose an expiration date for the collection less than 3 years away. This is especially likely when an agency proposes a one-time data collection that it expects to complete within a shorter time period. We compared the expiration dates agencies requested with those granted by OMB for a sample of 65 research, evaluation, and statistics submissions. Nineteen were approved for less than 2 years; of these, 8 were approved for less than a year, and 1 for less than 6 months. However, in 4 of the 8 cases with approval duration of less than a year (including the sole case in the sample of an approval for less than 6 months), the expiration date granted was the same as or later than the requested expiration date. Thus, an OMB approval for a short period is not by itself definite evidence that OMB has intervened to limit a collection. Nonetheless, in this sample of 65 cases, there were, in fact, 4 cases (6 percent of the approvals analyzed) in which a collection was approved for less than 1 year and in which this was for half, or less, of the period requested.

Variations Across Agencies and Types of Submission

The relatively high overall approval rate was not applicable to all agencies and types of submissions. There appeared to be a large number of agencies that have had perfect approval ratings in the OMB review process. We found, however, that a small number of agencies have had persistent difficulties in their relationships with OMB. Further, some types of submissions were less likely to be approved than others.

Variations in Agencies

Between 1982 and 1984, 25 percent of the agencies submitting requests to OMB had approval rates of 90 percent or less. The lowest approval rate was 38 percent; only 4 of every 10 submissions from this agency received OMB's approval. Across time, the general approval rate increased, but 14 agencies (or 7 percent of all those submitting proposals to OMB between 1982 and 1987) experienced persistent problems in gaining approval. These included 6 regulatory agencies and 8 nonregulatory agencies. As we will discuss later, factors other than quality inadequacies in the agency's submissions can contribute to such low ratings.

However, we found that many of the 211 agencies submitting requests had perfect approval ratings in the OMB review process; that is, between 1985 and 1987, OMB approved 100 percent of their submissions. Moreover, 117 of the 211 had approval rates of 95 percent or more, and these agencies submitted 63 percent of all 1985-87 requests, had an aggregate approval rate of 98 percent (a total of 125 submissions were disapproved or withdrawn), and accounted for 86 percent of the total burden hours that were requested. As we discuss later, this profile suggests the need to reexamine whether OMB should review every request.

Variations in Types of Requests

As shown in table 2.4, new data collection efforts were less likely to be approved than were recurrent submissions—that is, previously approved collections for which an extension, revision, or reinstatement was being requested. Whereas 96 percent of all recurrent submissions were approved, 89 percent of the new requests were approved.

Table 2.4: Approval Rates for New and Recurrent Requests 1982-87[a]

Purpose of submission	Recurrent	New	Total[a]
Regulatory or compliance	96%	91%	95%
Program planning	96	87	93
Application for benefits	97	93	96
Research evaluation or statistical	95	85	90
Total	**96%**	**89%**	**94%**

[a] Includes 20,368 actions; excludes 28 preliminary plans and 1 unclassified.

Further, approval rates for recurrent requests were roughly comparable across submissions with different purposes. That is, they ranged from 95 to 97 percent, regardless of whether the purpose of the collection was application for benefits, regulatory, for program planning, or research oriented. In contrast, the approval rate for new submissions for research-oriented collections was 8 points lower than the rate for new collections associated with application for benefits.

Chapter 3

Timeliness and the Technical Adequacy of OMB's Reviews

The majority of information collection requests were reviewed and acted upon by OMB within the time specified in the Paperwork Reduction Act of 1980. However, according to the reports management system, the median length of reviews increased by 41 percent between the early 1980's and 1987. In the early period, 1982-84, the median number of days a submission was in review was 39 days. For 1985-87, the median was 45 days. For 1987 alone, the median was 55 days. Much of this increase in 1987 appeared to be accounted for by the OMB practices that developed in response to congressional concern and culminated in the 1986 legislative amendment on procedures to enhance the likelihood of public comment.

The number of requests exceeding the 60-day review period increased 25 percent. Also, although still small numerically and proportionally, the number of submissions in review over 90 days has quadrupled in recent years. Furthermore, the case examples suggest that some reviews take longer when informal negotiations are considered (such as time devoted to presubmission reviews).

We found OMB's technical review of submissions adequate in some of the cases we examined. However, OMB initially disapproved proposals that we judged technically adequate, because the agency had failed to demonstrate to OMB that the collection had practical value or that the data were not duplicative. OMB has also approved proposals that we judged to be technically flawed. In some of these cases, OMB's reviewers stated that the presence of a legislative requirement or evidence of congressional support led them to approve the request as submitted, despite their own recognition that improvements could be made that might increase quality and reduce public burden.

While increased review time seems to be associated with reductions in burden brought about by OMB, these positive effects were limited to some kinds of new data collection activities. Delays associated with the review of recurrent data collections were not generally associated with reductions in burden.

Timeliness of Reviews

As indicated in chapter 2 the Paperwork Reduction Act stipulates that OMB is allowed 60 days to review submissions for paperwork clearance. This time period can be extended an additional 30 days if OMB notifies the pertinent agency. After 90 days have passed, if OMB has not acted, the agency can request and shall receive approval but only for a maximum period of 1 year.[1]

Overall Assessment of Timeliness

Overall, OMB has been relatively successful in meeting legislatively prescribed milestones. We examined the elapsed time between the date of submission and the date OMB acted for all requests submitted between 1982 and 1987. Between 30 and 40 percent of the submissions were acted upon within 30 days and 70 to 80 percent met the legislated 60-day time period. By the 90th day, 96 to 99 percent had been reviewed and acted upon. Also, during the intervals between days 50 and 60 and between days 80 and 90, a disproportionate number of submissions were acted upon. These cumulative percentages and the clustering before the 60-day and 90-day points indicate that OMB has made "good faith efforts" in trying to meet the deadlines.

The patterns of elapsed times were relatively consistent across different types of submissions. Among new requests associated with research, evaluation, or statistical collections, a slightly greater percentage of submissions required more than 60 days for clearance.

Our review of the case examples (all of which were research, evaluation, or statistical collections) indicates that the length of the OMB review process was often longer than the data from the reports management system indicate. This lengthening occurred in two ways: (1) there was a type of informal presubmission review that the system's data did not reflect or (2) a proposal was sometimes submitted more than once before approval was obtained. For example, one request that resulted in an approval had been preceded by a history of disapprovals; rather than taking 40 days, as indicated in the system, the request had actually been under review for 138 days. Also, disapprovals were often followed by a resubmission that showed up with a separate file number and review period. This masked the true amount of time it took for a collection to get through the review process. Four of the 7 disapprovals among our case examples were resubmitted. While the initial reviews of these requests took between 86 and 91 days, adding the time required for reviewing the resubmissions meant that the actual review periods ranged from 120 to 550 days. (See table 3.1.)

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[1] As noted earlier, agencies rarely if ever invoked this rule.

Table 3.1: Disapprovals That Were Resubmitted: Instances From Case Examples 1982-87

Case	Number of review days indicated in the reports management system	Actual number of review days from submission to approval	Percent increase over time indicated in the reports management system
A	86	550	540%
B	87	188	116
C	90	120	33
D	91	158	74

Furthermore, of the 17 case examples, the reports management system indicates that 6 were reviewed within 60 days. However, when we count the time associated with informal reviews prior to formal submission, only 3 cases were completed within 60 days.

Changes Over Time

Over time, the median number of days between the submission of a request and an OMB action on the request has increased. The median number of days before action was taken in the early period, 1982-84, was 39 days. The median increased by 15 percent in 1985-87 to 45 days.

In addition to increases in the median time of the review, there was a 25-percent increase in the number of submissions that exceeded 60 days between 1982-84 and 1985-87. (See table 3.2.) In the early period, 1982-1984, 19 percent, or 2,066, of all submissions exceeded 60 days; by 1985-87, 27 percent, or 2,589, of cases had exceeded this first 60-day milestone.

These increases were almost entirely the result of delays occurring in 1987, the most recent year for which we have data. Only 62 percent of the requests were acted upon within the required 60 days during 1987, and the median review period was 55 days in that year. Further, while the elapsed-time distributions were virtually identical for requests submitted in 1982-84 and 1985-86, in 1987 the pattern was much different. Whereas nearly 40 percent of all submissions prior to 1987 had been acted upon within 30 days, in 1987 this was true for only about 20 percent of the submissions.

Table 3.2: Reviews of Submissions Exceeding Allowable Times

Period	Number of submissions	Duration of OMB review: Greater than 60 days: Number	Greater than 60 days: Percent	Greater than 90 days: Number	Greater than 90 days: Percent	Greater than 100 days: Number	Greater than 100 days: Percent
1982-84	10,833	2,066	19.1%	87	0.8%	16	0.1%
1985-87	9,693	2,589	26.7	385	4.0	63	0.6
Change	−10.5%	25.3%		343%		294%	

In the early period, about 8 in 1,000 submissions exceeded the 90-day deadline (0.8 percent, or a total of 87 submissions). In the later period, 1985-87, 40 in 1,000 exceeded 90 days (4 percent, or 385 submissions). However, allowing for minor delays and potential errors in the record-keeping system, the number over 100 days may be a more realistic indicator of true violations of the 90-day limit. The numbers here were significantly smaller—0.1 percent and 0.6 percent of total submissions, respectively, for the two time periods. However, this still means that in 1985-87, the number was nearly four times what it was in the earlier period, 1982-84 (63 versus 16). According to OMB's records, a small number of submissions remained under review for 200 or more days.

Reasons for Delays

Our interviews with desk officers suggest that the most likely reason for the increases in review time in 1987 was congressional interest in greater public participation in the clearance process.[2] This congressional interest has been translated into a legislatively required practice of submitting to the Federal Register a detailed notification of intention to collect information. OMB's practices are designed to be responsive to the 30 days it takes to allow for public comment. This appears to account for some of the delay observed in 1987. As noted above, only 20 percent of the submissions were decided upon within 30 days in 1987; in earlier years, almost 40 percent were acted on in the first 30 days. Furthermore, of the 472 requests that exceeded 90 days, 247 (or 52 percent) occurred in 1987, when this policy came into effect.

It is not clear that these practices have facilitated the involvement of the general public. On the face of it, we would not expect the general public to monitor the Federal Register for notifications of paperwork submissions. More likely, the Federal Register would be monitored by special interest groups (lobbyists, professional associations), thereby providing a partial and potentially imbalanced picture of public sentiment toward a particular request. The desk officers we interviewed indicated infrequent public comment. One experienced desk officer told us that only about 2 percent of the submissions receive any public comments. Furthermore, the case examples provide some support for the suggestion that it is essentially interested parties (such as data users) who give feedback to OMB regarding data collections. If the objective is to solicit feedback from those who are interested, other procedures, which some desk officers report using, such as initiating contact with interested and knowledgeable persons and groups, might be more helpful.

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[2] One alternative explanation for these increases in review time is that the workload has increased. Given the trends in the number of submissions, however, this does not appear to be the explanation. While the median number of days consumed by reviews increased, the number of submissions decreased by 10.5 percent. Thus, the volume of submissions does not appear to be responsible for the recent increase in delays.

Even with a 30-day public comment period, our analysis of the process (see chapter 2) suggests that to the extent that the review is delayed for public comment, such a delay may not be necessary. Instead, public comment should be viewed as additional information that can be incorporated into the final decision. In fact, the case examples indicate that at least some desk officers do a quick review when they first receive the submission, send it out to various people for comments, both internally and externally, and then do a more thorough and final review after waiting for feedback from these sources as well as public comment.

Staff turnover appears to be another factor contributing to delays in the review process. Some agency managers and clearance officers mentioned it in the interviews. Turnover was also mentioned as having affected the review in 10 of the 17 case examples. Turnover was cited as having slowed down the process by leading to more scrutiny of a submission. In one case that was under review for 87 days, was disapproved, and was then approved about 6 months after the initial submission, OMB reported that because of turnover, the initial submission probably had not been looked at before 60 days or more. In another case of a large important submission in which a year and a half elapsed from the first submission to final approval, the desk officer left OMB after the completion of the case, and the submitting agency expressed concern that it would have to rejustify everything again for the new desk officer.

Other plausible reasons for delays include factors that are beyond OMB's control. As discussed in chapter 2, the decisions on requests often entail considerable contact with the submitting agencies. The speed of the review process, therefore, partly depends upon how quickly an agency can respond to OMB's inquiries. Interviews with desk officers confirmed that this was a possible source of delay. Investigation of our case examples revealed two instances in which the review may have been delayed while OMB waited for a response from the submitting agency.

Technical Adequacy of Reviews

The information collection requests from our 17 case examples were reviewed by three national experts who provided independent judgments on the technical quality of the proposals. Specifically, they were asked to rate the overall quality of the proposal on a 1-10 scale. The scores of the judges were added, and we set a cut-off point above which a submission was considered approved and below which it was disapproved.[3] Table 3.3 indicates the cases in which OMB and our experts agreed and disagreed.

Table 3.3: Comparison of GAO and OMB Assessments of 17 Information Collection Requests

	OMB		
GAO rating[a]	Approved	Disapproved	Total
Approved	3	4	7
Disapproved	7	3	10
Total	**10**	**7**	**17**

[a] Our ratings are based on the experts' technical review ratings.

In 3 cases, both OMB and our experts approved submissions. In 4 cases, OMB disapproved submissions that were approved by our experts. Three of these were later modified, resubmitted to OMB, and approved. In 2 of these cases, the agencies and OMB concurred that the changes resulted in improvements to the collections.

In 7 cases, OMB approved collections that were given a low rating for technical adequacy by our experts. In 4 of these 7 cases, OMB also flagged the technical flaws that our experts identified. In 3 of these 4 cases, the outcome of the review was reportedly influenced by the congressional requirements or mandates for the data. One desk officer explicitly stated that "it is required by legislation or it would not look the way it did." In 3 additional cases, both OMB and our experts disapproved submissions. In summary, OMB agreed with us on only 35 percent (6/17) of the review outcomes.

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[3] The purpose of the case examples was to examine the submission and review process in more detail. The 17 cases examined were selected from the universe of research, evaluation, and statistical requests for 1987 from our sample of 50 agencies (described later in detail). We chose cases to represent variation across several factors, including request type (new collection versus extension, one type of recurrent submission) and outcome (approval versus disapproval). To better assess the technical aspects of the review process, we sought independent judgments on the technical quality of the submissions from a panel of methodological experts. The form we prepared to guide them in their technical reviews specified dimensions (such as survey design, sample design, and validation procedures) on which the adequacy of the collection proposals could be assessed. This form was adapted from one developed for an earlier report on OMB's paperwork review functions (see U.S. General Accounting Office, Protecting the Public From Unnecessary Federal Paperwork, GAO/GGD-79-70 (Washington, D.C.: September 24, 1979)). After reviewing the proposals with this guidance, the experts reached independent judgments on the overall merit of each proposal.

Technical Problems Frequently Identified by the Experts

Problems in submissions frequently identified by our experts included (1) insufficient use of sampling techniques, (2) difficulties in data collection instruments, (3) expected response rates too low, and (4) too much potential for response bias.

Better use of sampling was seen as a way of conserving resources as well as of obtaining more-reliable data. For example, some of the collections would solicit responses from all members of the universe, or all persons in a certain category, but then would let members of the sample or universe self-select and not respond. In one important case, the motivation not to report or respond might be strongest for exactly that group whose responses were most critical. Expected response rates were often not reported or were unacceptably low. Our experts suggested that in many such cases, a more accurate yet less burdensome approach would be to seek data from a sample of respondents, deciding the percentage of potential respondents that would give an adequate representation of the universe, and attempting to obtain a higher response rate from those sampled. The quality of the data, and therefore their usefulness, was expected to improve with this approach.

Another common observation made by both the OMB reviewers and our experts was that the agencies appeared to be unable to narrow their questions and ask only for information that was really needed and would be used. Excessive detail increases the burden on respondents and generally degrades the quality of their responses.

The potential for obtaining biased responses was a concern of our experts in a third of the case examples (6/17). This problem is particularly important when questions are asked of persons who have a vested interest in the topic and there is no documentation to verify the validity of their responses. Several submissions our experts reviewed did not contain safeguards against this type of bias or ways of estimating the size and direction of bias.

Are Delays Worth While?

In this chapter, we have shown a 41-percent increase between the early 1980's and 1987 in the median number of days required for OMB's reviews.

What benefits accrue from the review process? With regard to burden, our answer to this question is that OMB's reviews are plausibly associated with a reduction in the amount of burden associated with selected types of information collection requests. These include new research-oriented data collection activities that are required for receiving benefits (whether cash or noncash assistance) or mandatory.

The results from a content analysis of OMB's comments on these submissions (which show a large increase in the proportion of these submissions being modified as a result of OMB's review) suggest that observed delays were related to substantial reductions in burden. Increased attention and guidance from OMB were associated with reductions in median burden hours per respondent of 47 and 90 percent for new research, evaluation, or statistical data collections that were mandatory and for those required for the receipt of benefits, respectively.

However, while the burden per respondent seems to have been reduced in these cases, increased delays associated with most of the submissions, including the vast majority of those for recurrent data collection, were not characterized by reductions in burden.

Further, we have also shown that the technical adequacy of the reviews was questionable—some were approved that have potentially serious flaws. In addition, as we demonstrated in chapter 2, only a small percentage (5 to 7 percent) of submissions are disapproved or withdrawn and a minority (8 to 12 percent) are formally modified. In summary, this pattern of data raises a serious question about the value of the review process as it is currently constituted.

The Influence of OMB's Actions on Agency Decisions to Collect Information

Mechanisms for responding to the Paperwork Reduction Act and OMB's implementing guidelines have become a prominent feature of agency decision processes regarding information collections. All the agencies we reviewed have developed processes for the internal review of proposed information collections, but these processes vary across the agencies. Some of the agencies that have been the most successful in obtaining OMB's approval for information collections have developed extensive internal guidance on the preparation of collection requests, and they conduct technical reviews of proposed collections to ensure the technical adequacy of their requests. In addition, some agencies give greater attention to new data collection activities in their internal reviews, and in some cases agencies draw OMB into the decision process earlier, through informal presubmission contacts. For some agencies, the OMB review process has necessitated additional time to complete the various reviews that have been initiated. Finally, overall reactions to the process have been mixed; nearly half the managers we interviewed stated that some decisions to collect information had been negatively affected by OMB's reviews.

The Information Collection Request Development Process

The development of requests to collect information involves a number of stages. In the first stage, development can be initiated in several ways. A request for a new collection may be initiated by the program office that has responsibility for particular issues or subject matter. The Congress may also initiate a new information collection, as in the case of studies specifically mandated in legislation. A program office or an agency official with paperwork responsibilities may initiate the preparation of a request for the extension, revision, or reinstatement of a recurring collection.

Once a proposed information collection has been developed, the paperwork necessary to submit a collection request to OMB must be prepared. That is, as noted earlier, the SF-83 must be filled out, and a justification statement must address 15 questions regarding the collection.

After a collection has been prepared in a program office, it goes through one or more intradepartmental reviews. Various offices may have responsibility for reviewing requests prepared by a program office. In some instances, such as in the Environmental Protection Agency and the Department of Commerce, both an agency or program office clearance officer and a department-level clearance officer review the request. Some proposed collections undergo a technical review, either within the responsible program office or elsewhere. For example, in the Department of Labor, proposed statistical surveys are reviewed by the Bureau of Labor Statistics. Proposed collections may also undergo review by a department's office of general counsel. If the outcome of an internal review is negative, a request may be returned to the initiating office for modification.

When the department's clearance officer or other authorized official signs the request, the package is sent to OMB for review. Simultaneously, the agency sends a notice of the information collection to the Federal Register.

As a result of prior experience with OMB, agencies may add layers of review in an attempt to identify potential problems and bring agency managers and staff closer to the discussion with OMB. For example, the Department of Commerce now requires that all collections from the Bureau of the Census be sent through the assistant secretary for administration and the undersecretary for economic affairs prior to their delivery to OMB. Prior to the 1980 act, the Bureau sent proposals directly to OMB for review.

Time Requirements

The departments' clearance officers and other clearance officers we interviewed in major agencies reported that the time required to process new submissions varied considerably. The majority indicated that developing new requests generally took less than 2 months. Others stated that the typical duration greatly exceeded 2 months (for example, one department clearance officer estimated that it took 4 to 6 months). Another department clearance officer told us that the high end of the range was 12 months to develop a new submission. Most of the clearance officers indicated that the amount of time devoted to developing new requests had been unaffected by OMB's implementing regulations. However, in five major departments, the clearance officer indicated that it takes longer now than it did prior to the regulations to develop new requests.

For recurrent requests, most clearance officers reported that shorter time intervals were required, relative to new submissions. Requests were generally developed within a month, and frequently the requests were prepared within a matter of days. As above, the majority of the clearance officers we interviewed reported no change in the amount of time required to develop a recurrent request. Only two department clearance officers indicated that elapsed time had increased; one said it had decreased since the implementation of the 1980 act.

When the time spent in the development and review of the collection and the submission package within the agency is added to the time required for OMB's review, a typical information collection cannot be expected to be operational or "in the field" for over 3 months (this period can range from 2 months to over a year). Many factors may affect the length of the development period in the agency (for example, pretesting adds to the development period) and the review period in OMB (for example, complex research, evaluation, or statistical collection may require longer review periods than compliance collections). The case examples indicated that some agencies are aware of these factors and take account of them in planning information collections.

The Characteristics of Successful Paperwork Development Practices

As stated in chapter 2, we found that many of the agencies and departments that submit requests to collect information had perfect or nearly perfect records in gaining OMB's approval. In large measure, they have responded to OMB's clearance process by establishing parallel types of review, potentially duplicating OMB's function. In particular, some of the successful agencies we reviewed have developed formal, up-to-date, written paperwork clearance guidelines that address, in detail, issues such as levels of review and who is responsible for the review. Further, in several instances, we discovered that the agencies had compiled examples of successful practices, showing the necessary forms and illustrating what has worked in obtaining OMB's approval.

Another feature of some successful agencies is the role played by the clearance officer. For example, documents from the Department of Commerce suggest that the department's clearance officer provides considerable feedback on individual requests.

We also found instances in which department and agency policies require specialized reviews of requests before they are submitted to OMB. For example, according to the clearance officer in the Department of Education, statistical collections must go through a technical review.

Finally, in addition to developing parallel review functions, we found that, in some cases, successful agencies contact OMB regarding the progress or outcome of reviews of collection requests that have been submitted. One department had initiated discussions with OMB about developing a system that would allow it to access OMB's docket library directly. The rationale behind this proposal was that the department is often not sure that OMB had received the request, especially when there had been substantial delays in OMB's beginning its official review.

Systematic review processes do not ensure success within OMB. In some agencies, factors outside the paperwork clearance process have affected success with OMB's review. For example, within one department that has a well-documented, systematic paperwork clearance process, two agencies (one statistical, the other nonstatistical and nonregulatory) have had very different experiences with OMB's reviewers. The statistical agency had an approval rate nearing 100 percent for 1985-87, while the other had a rate of under 50 percent. Discussion with an official in the latter agency suggested that the agency was having difficulties for several reasons, including the inexperience of desk officers and the involvement of a staff member in another reviewing office at OMB who had a personal agenda. At one point, the agency initiated presubmission discussions with higher-level OMB staff in an attempt to alleviate its policy and substantive difficulties with a particular collection. Since then, the agency has had few difficulties with that collection.

Various Strategies Employed to Gain OMB's Approval

Agencies use various strategies to gain OMB's approval of their information collections. Interviews with clearance officers revealed two types of strategy: (1) identification of collections requiring added attention and (2) contact with OMB prior to actual submission.

Requests Receiving Special Attention

Almost all department and agency clearance officers (16 of 17) whom we interviewed reported that special attention was directed at specific types of collections or at collections stemming from specific units within their jurisdictions. In particular, 10 of 17 clearance officers reported that they gave special attention to requests coming from specific units. These include, for example, the Bureau of the Census, the Bureau of Public Debt, and the Office of Toxic Substances. Further, units or collections that have had previous difficulties were reported as receiving special attention by 3 of 17 clearance officers.

As for individual requests, new collections were mentioned as receiving special attention by 6 of 17 clearance officers, politically sensitive requests were mentioned by 3 of 17, and large-burden collections were identified by 4. In addition, specific topic areas were identified as receiving added attention. These included, for example, requests related to AIDS, child abuse, and the decennial census.

Presubmission Contacts

All 17 clearance officers whom we interviewed reported some presubmission contact with OMB. The level of contact varied dramatically across departments and agencies, involving 1 to 100 percent of all 1987 submissions. The majority (10 of 17) of the clearance officers indicated that 5 percent (or fewer) requests involved any presubmission contact with OMB. The most frequent reasons offered for these contacts included "bouncing ideas" off OMB staff, discussing sensitive or special interest collections, and emergencies. When asked what fraction of these collections were subsequently submitted to OMB, the majority (11 of the 17) indicated that all were eventually submitted. We did not assess whether requests had been substantially altered as a result of these presubmission contacts with OMB.

The Role of the Information Collection Budget

Another factor affecting an agency's decision to collect information is the information collection budget, which determines the maximum number of hours an agency can require the public to spend annually responding to its information collections. Agencies must plan their annual information collections with this ceiling in mind. Since 1981, a reduction in the overall burden of existing data collections has been called for each year, by legislation in some years and by OMB directive in others. Current legislation calls for a 5-percent reduction in existing paperwork burdens in each year from fiscal year 1987 through fiscal year 1990.[1]

Some agency officials described concerns about the effect of the information collection budget process on information collections. Some officials indicated that the process has been used to "redline" specific information collection not favored by OMB. OMB itself has indicated that it may recommend specific collections for reduction or elimination in the course of this budget's process. Concerns were also raised by individual agency officials about the cost of this process and about the lack of consistency between timelines for preparation and review of the information collection budget and fiscal budget timelines.

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[1] Such reductions are calculated on the existing inventory of information collections. If a congressional mandate requires a new information collection by an agency, the agency's base is increased to allow for it. However, when congressional action increases the burden of an existing collection, the agency's base is not formally increased.

A number of agency officials expressed concern about the continual reductions in the information collection budget that have been required each year. While some indicated that the automation of collections or the consolidation of forms had allowed their agencies to meet past reduction goals, we were also told by officials for one agency that required burden reductions had forced them to eliminate all program evaluation collections in order to continue mandated collections relevant to benefits entitlement. Officials for several agencies suggested that requirements for further reductions were unrealistic, given the extent of the reductions already made. One official indicated that collections had already been reduced to the "bare bones," another official that the agency's collections had reached the "absolute bottom" that could be attained "without compromising agency functions." Officials at other agencies made no specific references to the information collection budget process.

Overall Experience With OMB

Overall, the agency managers we interviewed reported both positive and negative experience with OMB and the paperwork review process. Of those reporting negative experience with OMB, many cited the turnover and inexperience of the desk officers as factors. Although some of the agency managers we interviewed indicated that the review process had a neutral effect or no effect on their capacity to plan information collections, their ability to continue existing collections, or the contents of their collections, nearly half the respondents indicated that OMB's reviews had a negative effect on one or more of these activities. For example, one unit in a large department documented numerous problems associated with what its members described as "conflicting signals from OMB." The opinions of officials in this unit were summarized by one official as follows:

> "Different offices in OMB are requesting or demanding detailed changes in what questions are asked, how the questions are worded and what survey will carry the questions. These requests now occur routinely during the final weeks of the forms review process. They are sufficiently frequent and inconsistent to be causing us significant problems in planning our work. As important, these requests and demands tend to bypass or subvert the professional judgment of [our] statisticians concerning matters in which they are trained, experienced, and held accountable by their supervisors in the Department and by users of the data."

The official concluded that higher costs and uncertainty in planning surveys has resulted from increasingly arbitrary, conflicting, and last-minute signals and directions from OMB.

When these respondents were divided into agencies with high versus low approval rates in 1985-87, agency managers in low-approval-rate agencies were somewhat more likely to cite losses in data collections or to be critical of the value of OMB's changes in the contents of their collections.

Chapter 5

How Agency and OMB Actions Have Influenced the Availability of Information

OMB's and agencies' practices appear to have had positive, neutral, and negative influences on the likely availability of information. On the positive side, some agencies have eliminated collections that agency officials viewed as duplicative or no longer useful. Further, in some agencies, officials told us that availability had not been influenced at all by the OMB clearance process. On the negative side, some agencies have stopped collecting some data because of difficulties encountered in the clearance process; that is, for these agencies, OMB review has had a "chilling effect" on the likely availability of information.

Since the early 1980's, the number of information collection requests submitted to OMB has declined by about 10 percent. Thus, overall, there may be less information available now than in the past. This reduction was not uniform across agencies and types of information, however. Among the decreases, regulatory agencies such as the Federal Trade Commission have submitted about 17 percent fewer requests. Further, the nonstatistical agencies (both regulatory and nonregulatory) that experienced difficulties in obtaining clearance from OMB have submitted disproportionately fewer requests in recent years. For these agencies, we found differential reductions associated with low approval rates of 3 to 8 percentage points for new collections and 14 to 23 percentage points for all research-oriented collections. In addition, the respondent burden associated with new submissions has been reduced. However, recurrent collections constitute the largest source of burden—and the number of submissions in this category has not declined. Also, data collection requests from statistical agencies such as the Bureau of the Census have increased in number since the early 1980's.

Finally, submissions were increasingly focused on collecting the "bare essentials." That is, requests involving information that is required to receive benefits or that is mandatory were more likely to be submitted than those involving voluntary participation. Research-oriented submissions are more likely to fall into the latter category. While only useful data should be collected, limiting collections to the bare essentials required by law may sacrifice information important for program evaluation and other public purposes.

The majority of agency officials we interviewed indicated that strategies to circumvent the OMB review process had been tried, regardless of agency approval rates. The use of these tactics did not appear to have been frequent enough to offset the reductions in formal submissions.

Influences of OMB and Agency Practices on Data Availability: Some Illustrations

Illustrations derived from interviews with agency officials suggest that reductions in the availability of information have been both negative and positive.[1] For the former, the OMB review process has resulted in the elimination of data collection activities regarded as worth while. This has been referred to as the chilling effect of OMB review. In other words, obstacles encountered as part of the OMB review process have led some agencies to abandon or scale back some of or all their desired data collection efforts. However, the review process has operated as intended for some agencies. That is, agency officials believe unnecessary data collection has been eliminated or quality has been improved.

Illustrations of Chilling Effects

"The Catch 22"

One agency official we interviewed stated that data are now less available, especially with regard to effects of the programs under their jurisdiction. Further, the office has been caught in a "Catch 22." That is, OMB's budget examiners have called for data detailing program effects to justify funding, while OIRA cuts away the data collections needed to provide such information. For this agency, the official noted that data on program recipients have in effect been eliminated, and, since the early 1980's, paperwork reviews and resulting cuts in collections have made it impossible to analyze patterns of program participation by various demographic categories. Thus, changes in who is getting specific benefits are unknown for this agency's program.

Active Discouragement

In one agency, an official stated that information had not been gathered in a particular area because of OMB's strong position that the less information collected about this area the better. According to the official, reviews of 5 or 6 requests had caused so much difficulty with OMB that further collections on this topic area had been discouraged. The official stated that representatives of OMB's budget division also have actively discouraged work in the area. Studies on one topic in this area were approved only after a lot of negotiating. And data collection in this area may have been hindered by expectations of OMB's negative reception of requests.

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[1] The illustrations in this section were drawn from interviews with agency officials. They represent the views or perceptions of these individuals. We were not able to verify their statements. In responding to a draft of this report, OMB provided its views on the events that may have transpired for some illustrations (see appendix IV).

Small Studies Abandoned

An agency official indicated that the OMB review process had not affected long-term data collection but that short-term collections had been negatively affected. According to this official (1) the time required for preparation of the request and its reviews had discouraged getting them started; (2) the agency's capacity to respond to discrete, short-term events had been impeded by the review process; and (3) some recurrent, small-scale collections had been terminated in order to meet information collection budget reduction targets.

Developmental Research

An official from a research agency stated that OMB's criteria thwart the developmental process of research that is built on a more open-ended exploratory methodology and that later culminates in the kind of structured, quantified research with identifiable users that can be justified by OMB criteria. The area of AIDS and estimates of its transmission by drug users to the general heterosexual population was cited as an example of an area and a type of research that just is not done because of OMB's review requirements.

Illustrations of Positive Reductions in Availability

Self-Examination

In another agency, the official we interviewed indicated that the agency used the Paperwork Reduction Act as justification for a self-examination of the agency's information portfolio. Statistical data collections were discontinued in 1980, in part because of the impending passage of the act. Other collections were terminated in the mid-1980's for lack of use. One submission that OMB had disapproved was not resubmitted because the agency determined that management issues could be decided without this data collection.

Joint Ventures

According to an official in one agency, OMB disapproved a proposal to collect employment data, offering the rationale that it was redundant with an existing form used by another agency. In response, both agencies developed a joint form that satisfied their separate needs and minimized burden.

Influences on Availability: General Changes in Submissions

The availability of up-to-date information for program management, congressional oversight, and public accountability depends on a variety of factors. Of particular concern is whether agencies continue to take the necessary first step by submitting requests for review.

Overall Submission Levels

The number of requests submitted to OMB during 1985-87 declined by a little more than 10 percent relative to the number of submissions in the previous 3 years. Total requests dropped by about 1,100 between the two periods. The average numbers submitted annually were about 3,600 in the first period and a little over 3,200 in the second period, for a decline in the annual rate of about 380 submissions. Although the analysis above does not indicate whether there has been a general diminution of available information, it does establish the possibility that one has occurred. More-detailed analyses are needed to explore this possibility. These are presented below.

Regulatory, Nonregulatory, and Statistical Agencies

As shown in table 5.1, most of the aggregate decline stemmed from the decline in submissions from regulatory agencies such as the Federal Trade Commission. (Appendix I indicates which of the 211 agencies were classified regulatory, nonregulatory, statistical, or other.) During 1982-84, 72 regulatory agencies submitted over 7,500 requests for OMB's review. During 1985-87, about 1,200 fewer requests were submitted. Eight agencies with statistical information-gathering as their primary mission, such as the Bureau of the Census, increased their submissions by about 8 percent, from 545 to 589. And other agencies, while submitting few requests in either period (204 and 317 for 1982-84 and 1985-87, respectively), also showed an increase in the number of requests submitted to OMB. Nonregulatory agencies submitted somewhat fewer requests, declining by 2 percent.

Table 5.1: Changes in Information Collection Requests by Agency Type

Agency type	Number of agencies	Number of submissions[a] 1982-84	1985-87	Change
Regulatory	72	7,523	6,283	−16%
Nonregulatory[b]	58	2,561	2,504	−2
Statistical	8	545	589	8
Other agencies[c]	73	204	317	55
Total	**211**	**10,833**	**9,693**	**−10%**

[a] Includes all submissions that were approved, disapproved, withdrawn, or ruled not subject to OMB review

[b] All agencies submitting 10 or more information collection requests in 1982-84 and at least 1 in 1985-87 and not identified as regulatory or statistical are classified as nonregulatory agencies

[c] Agencies submitting fewer than 10 information collection requests in 1982-84, or submitting 10 or more in 1982-84 but submitting none in 1985-87, are classified "other agencies." This category may include agencies with regulatory or statistical functions

Differential Agency Experience

If the clearance process has had a chilling effect on agencies' decisions to submit requests, we might expect to find that submissions had declined for agencies that had the most difficulty in obtaining clearance from OMB's reviewers. Using data from the 43 statistical, regulatory, and nonregulatory agencies in our sample of agencies, our analyses suggest that the OMB review may indeed have resulted in a reduction of submissions for agencies with relatively low approval rates.

As shown in table 5.2, agencies with relatively high approval rates reduced their submission level by 5 percent. Those with low approval rates in 1985-87 submitted 19 percent fewer requests. Further, the effect was found in both regulatory and nonregulatory agencies.[2] These results suggest that the availability of data from agencies that have had frequent difficulties with the clearance process is likely to be diminished to an extent beyond that associated with similar agencies with fewer OMB problems. The 9-percentage-point additional reduction for regulatory agencies with low approval rates and the 19-percentage-point additional reduction for nonregulatory agencies with low approval rates could be interpreted as an indicator of the chilling effect of OMB review on these agencies.

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[2] The agencies in our sample have been classified by the approval rate for their submissions during 1985-87. However, agencies with high approval rates during 1985-87 were also more likely to have their submissions approved during 1982-84. Among the 50 agencies, those with high 1985-87 approval rates saw 94 percent of their submissions approved in 1982-84, while those with lower rates in 1985-87 experienced a 90-percent approval rate in 1982-84.

Table 5.2: Changes in Submissions by Agency Type and Approval Rate for Selected Agencies

Agency type	Approval rate 1985-87	Number of agencies	Number of submissions 1982-84	Number of submissions 1985-87	Change
Regulatory	High	14	2,150	1,933	−10%
	Low	6	439	354	−19
Nonregulatory	High	9	454	454	0
	Low	6	360	291	−19
Statistical	High	8	545	589	8
Combined[a]	High	31	3,149	2,976	−5
	Low	12	799	645	−19
Total		**43**	**3,948**	**3,621**	**−8%**

[a] Data for the 7 other agencies in the sample of 50 have been excluded from this and subsequent analyses because of the very small number of submissions from these agencies and because agencies with very few submissions cannot be meaningfully classified by approval rate

Is this necessarily a bad outcome? Our data indicate that higher rates of OMB disapprovals for some agencies cannot be interpreted to mean that the public has been protected from technically inadequate data collection by those agencies. As described in chapter 3, OMB's own technical reviews are open to question. And as we have reported in our illustrations, some disapprovals and decisions not to submit requests in particular areas are the result of nontechnical concerns associated with other factors stemming from OMB.

Types of Submission

As described in prior chapters, agencies submit a variety of types of requests. The extent to which OMB's policies and practices influence agency decisions could be manifested in the types of requests submitted. In assessing whether agencies decided to alter the types of requests they submitted, we looked at changes in the mix of new versus recurrent requests, research-oriented and other types of information, and the response status of the submissions (that is, whether participation was voluntary, required for the receipt of benefits, or mandatory). We contrasted the changes experienced over time by high- and low-approval rate agencies in the number of submissions in different categories.

New Versus Recurrent Collections

As seen in table 5.3, the 8-percent aggregate decline in submissions from the 43 agencies in our sample was a result of two opposite trends. Submissions involving previously collected data (that is, recurrent collections) increased by about 6 percent, but as many as 36 percent fewer new submissions were submitted between 1985 and 1987 as were submitted between 1982 and 1984. Further, because statistical agencies increased the number of their new submissions by nearly a quarter, the substantial decline for regulatory and nonregulatory agencies is obscured by the aggregate figure. Specifically, new submissions were reduced by 46 to 50 percent for these agencies.[3]

Table 5.3: New Versus Recurrent Submissions by Agency Type

Agency type	Number of agencies	Type of submission	Number of submissions		Change
			1982-84	1985-87	
Regulatory	20	New	728	394	−46%
		Recurrent	1,860	1,893	2
Nonregulatory	15	New	404	203	−50
		Recurrent	408	542	33
Statistical	8	New	207	256	24
		Recurrent	336	333	−1
Combined	43	New	1,339	853	−36
		Recurrent	2,604	2,768	6
Total			**3,943**	**3,621**	**−8%**

Differential Experience

The reductions in new submissions were even greater for agencies with low approval rates (see table 5.4). Overall, agencies with low approval rates submitted 51 percent fewer new submissions in the later period. In contrast, those with high approval rates submitted 31 percent fewer new requests.

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[3] Not all the reduction in submissions OMB identified as new can be attributed to the OMB review process. In particular, some portion results from the fact that shortly after the passage of the 1980 act, there was an influx of submissions that OMB labeled "new," even though some had been collected by the agency prior to the requirement that all information collection efforts be reviewed by OMB. It is not possible to ascertain how much this effect has inflated the size of the 1982-84 counts. Thus, we have characterized these results as reflecting probably the maximum reduction in new submissions.

Table 5.4: New Versus Recurrent Submissions by Agency Type and Approval Rate

		Types of submission					
		New			Recurrent		
Agency type	Approval rate	1982-84	1985-87	Change	1982-84	1985-87	Change
Regulatory	High	568	310	−45%	1,582	1,623	3%
	Low	160	84	−48	278	270	−3
Nonregulatory	High	210	113	−46	244	341	40
	Low	194	90	−54	164	201	23
Statistical	High	207	256	24	336	333	−1
Combined	High	985	679	−31%	2,162	2,297	6
	Low	354	174	−51%	442	471	7

Agency Types

Within regulatory and nonregulatory agencies, the differences between agencies with high versus low approval rates were not as great. The number of new submissions was reduced between 45 and 46 percent for those with high approval rates but between 48 and 54 percent for those with low approval rates. The 3-to-8-percent age-point differential between high- and low-approval rate agencies seen in table 5.4 could be interpreted as the net chilling effect on new collections of OMB policies and practices (taking into account the surge of submissions labeled as new collections resulting from the passage of the 1980 act).

The Shift Away From Research-Oriented Requests

Agency Types

Within regulatory agencies, research-oriented submissions—those involving the collection of research, evaluation, or statistical information—declined more than nonresearch requests. That is, regulatory agencies submitted 32 percent fewer research-oriented requests while reducing their nonresearch submissions by about 10 percent. (See table 5.5.) Both types of submission fell by about the same amount (12 and 8 percent for research and nonresearch, respectively) in nonregulatory agencies. For statistical agencies, research-oriented requests accounted for the entire increase.

Table 5.5: Changes in Research Versus Nonresearch Collections by Agency Type

Agency type	Number of agencies	Type of submission	Number of submissions 1982-84	Number of submissions 1985-87	Change
Regulatory	20	Research	242	165	−32%
		Nonresearch	2,347	2,122	−10
Nonregulatory	15	Research	161	141	−12
		Nonresearch	653	604	−8
Statistical	8	Research	415	459	11
		Nonresearch	130	130	0
Combined	43	Research	818	765	−6
		Nonresearch	3,130	2,856	−9
Total			**3,948**	**3,621**	**−8%**

[a]Research submissions include research, evaluation, and statistical collections.

Differential Experience

Table 5.6 reveals that the reduction in research-oriented requests was concentrated among agencies with low approval rates. That is, whereas the number of research-oriented submissions was unchanged on the average for agencies with high approval rates, submissions declined by over one third for those with lower approval rates. Regulatory agencies with poor approval rates reduced their research-oriented submissions by 41 percent and nonresearch-oriented requests by 14 percent. These were greater reductions than witnessed for similar agencies with high approval rates.

Table 5.6: Changes in Research Versus Nonresearch Collections by Agency Type and Approval Rate

		Research[a]			Nonresearch		
Agency type	Approval rate	1982-84	1985-87	Change	1982-84	1985-87	Change
Regulatory	High	159	116	−27%	1,991	1,817	−9%
	Low	83	49	−41	356	305	−14
Nonregulatory	High	83	82	−1	371	372	0
	Low	78	59	−24	282	232	−18
Statistical	High	415	459	11	130	130	0
Combined	High	657	657	0	2,492	2,319	−7
	Low	161	108	−33	638	537	−16

[a]Includes research, evaluation, and statistical collections.

For nonregulatory agencies with low approval rates, about 24 percent fewer research-oriented requests were submitted and 18 percent fewer nonresearch requests went to OMB for approval. Submissions in each category for nonregulatory agencies with high approval rates were virtually unchanged. For research-oriented submissions, the net additional reduction in submissions associated with difficulties in obtaining OMB approval was roughly 14 percentage points and 23 percentage points for regulatory and nonregulatory agencies, respectively.

Type of Participation

Over time, fewer discretionary information collection requests were submitted to OMB, particularly from regulatory agencies. Specifically, the number of requests involving voluntary participation declined by 16 percent overall in our sample of agencies. For regulatory agencies, the decline was 27 percent (see table 5.7). However, requests requiring mandatory participation increased by 3 percent, and those required for the receipt of benefits declined only modestly (about 7 percent). Submissions by statistical agencies increased by 51 percent for benefits-oriented collections and 24 percent for data collection involving mandatory participation.

Table 5.7: Changes in Types of Submission by Agency Type

Submission type	Agency type	1982-84	1985-87	Change
Voluntary	Regulatory	459	335	−27%
	Nonregulatory	195	178	−9
	Statistical	340	325	−4
Total		**994**	**838**	**−16%**
Required for benefits	Regulatory	743	662	−11%
	Nonregulatory	480	463	−4
	Statistical	45	68	51
Total		**1,268**	**1,193**	**−6%**
Mandatory	Regulatory	1,289	1,280	−1%
	Nonregulatory	73	96	32
	Statistical	153	190	24
Total		**1,515**	**1,566**	**3%**

Reductions in Burden or Size of Submissions

Rather than not submitting an information collection request, an agency might reduce the burden of the collection in a variety of ways (such as asking fewer respondents to complete an information request, asking fewer questions per respondent, or improving the clarity of the questions asked). To provide comparable indicators of change in burden across agencies, we examined median values across submissions of the average number of hours estimated per respondent and total burden estimated per submission.[1]

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[1] Data reported are for approved submissions. Burden-hour data were not available for other submissions.

On both indicators, we found that the 211 agencies in the aggregate had not altered the size of their submissions over time. The median number of burden hours for 1982-84 was 2,500; for 1985-87, the median was 2,496. In addition, we found virtually no difference in the distribution of requested burden hours. During both periods, nearly 40 percent of the submissions requested 1,000 or fewer total burden hours. An additional 21 percent of the submissions involved 1,000 to 5,000 total burden hours. Further, 6 percent of the requests submitted during the two periods entailed 500,000 or more burden hours (these 6 percent of submissions account for 94 percent of the total federal paperwork burden). Similarly, for the average number of burden hours per respondent, median values were 1.8 and 1.9 for the early and later periods, respectively. However, these overall figures mask changes that appear to have occurred in some groups of requests.

New Versus Recurrent

New submissions tended to be shorter for the 211 agencies in later years—median values of 1.5 hours for 1982-84 and 1 hour for 1985-87. Medians for recurrent requests changed little.

Differential Experience

Agencies with low approval rates had decreased the size of some submissions. For new submissions, regulatory agencies with poor approval rates reduced their median burden hours per respondent by about two thirds (median values 10.0 and 3.4 hours for 1982-84 and 1985-87, respectively; for new collections from regulatory agencies with high approval rates, there was a smaller reduction in median hours per respondent, from 2.0 to 1.3 hours). Recurrent submissions from nonregulatory agencies with low approval rates also tended to be shorter in later years (medians of 2.5 and 1.9 hours for 1982-84 and 1985-87, respectively). Other types of agencies either maintained submissions of roughly comparable size or increased the burden per respondent.

Informal Practices

It has been suggested that in addition to agencies' altering the number, type, or size of information collection requests that they submit to OMB for review, they have devised ways of circumventing the review process altogether. They may also have engaged in procedural strategies to increase the speed of the review or increase the chances of approval. We found that most agencies—regardless of their submission approval rates—have engaged in some informal practices. In general, according to interviews with agency officials, any one strategy was not used very often. And despite the fact that some agencies reported using multiple strategies, circumvention does not appear to have been frequent enough to offset losses in data collection that have resulted from reductions in submissions.

Circumvention Strategies

Interviews with agency officials reveal that a substantial majority (14 of 17, or 82 percent) have used ways to circumvent the OMB review procedure. At least one third of the agencies reported using up to three different strategies, and nearly half engaged in two or more circumvention strategies. The implementation of these practices was rare to occasional, but they do give an indication of what agencies have been willing to do to avoid the OMB review process.

As we described in chapter 1, agencies are required to submit requests for clearance to gather information involving 10 or more individuals. Interviews with agency officials revealed that a majority (13 of 17, or 76 percent) have—whether rarely or occasionally—circumvented this requirement by dividing up a survey so that no single instrument affects more than 9 respondents. Further, slightly over half (9 of 17) of the agency officials we interviewed indicated that they have—albeit rarely—avoided paperwork review by carrying out an information collection without submitting a data collection request to OMB for review. And 7 of 17 officials indicated that they have avoided the clearance process by gathering information through consultants kept on retainer or through broadly specified grant awards. While these agency officials acknowledged that this strategy had been used, most indicated that it was rarely employed.

While individual circumvention strategies were used infrequently, circumvention may be more frequent than implied by the frequencies of individual tactics. Our interviews revealed that all three of the circumvention strategies discussed above were used—at least rarely—by about one third of the agencies in our sample. Nearly half the officials reported engaging in two or more circumvention strategies. Only 3 officials (of 17) indicated that they never tried to circumvent OMB review. There were no substantial differences in the use of circumvention by agencies with high versus low approval rates.

Examples of Alternative Data Collection Strategies

One official told us that the 1980 act clearly permeates thinking in his agency with regard to planning as well as program evaluation. For one example, he indicated that grants are awarded without solid data requirements to feed into evaluations. He told us that every time a paperwork review becomes a possibility in connection with a project, a lot of energy goes into finding an alternative. Our interviews have identified a variety of examples of how agencies use alternative data collection strategies to collect data that are seen by the agency as needed while avoiding OMB review. Examples include the use of public forums, focus groups, and joint ventures.

Public Forums

Partly in response to problems associated with the OMB review process, one agency used a public forum, instead of a survey, to obtain public attitudes about a federal program. The official we interviewed indicated that the use of public forums was more costly (about twice as much) but more timely than the use of a survey. Questions about the reliability of the data were also expressed. However, the official suggested that this format had a side benefit of improving public relations for the agency by enhancing public participation.

Focus Groups

Agency officials in one interview indicated that their preference was to use a survey to gather information. On some occasions, however, they have avoided OMB's review by conducting focus groups. These are generally small groups with a leader who facilitates structured discussions of topics. Focus groups are also used to gather opinions, attitudes, beliefs, and behavioral measures. The data collection process is generally not as structured as in a survey questionnaire. In this way, with small groups, it can be argued that no more than 9 individuals receive the same set of questions.

Cooperative Ventures

One agency reported that its efforts to evade the clearance process have included seeking nonfederal sponsorship of studies. The agency then uses the data that are collected. In one particular case, resistance at the federal level resulted in the study's being primarily funded through a foundation, with some assistance from federal agencies. The agency official we interviewed stated that the data were used in a legal decision regarding a jurisdictional dispute between his department and a state. The official went on to speculate that if the collection had depended on OMB's review, the study could not have been done.

"Dear Colleague" Letters

In one case, agency officials told us that OMB interpreted a letter to institutions as a data collection effort. This had not been the intent of the agency. Rather, according to agency officials, the letter had been written to institutions to inform them of a change in the law and to invite them to contact the department with questions. OMB initiated a review and, according to the agency official, held other information collection requests "hostage" (did not approve other requests) until the issue was resolved.

Procedural Tactics

Rather than avoid the OMB clearance process, agencies have attempted in some cases to reduce the review period by requesting expedited reviews (13 of 17, or 76 percent). However, agencies varied in the extent to which such requests were made, ranging from rarely to frequently. And some officials indicated that this tactic had not been effective in obtaining earlier approvals.

Our interviews also revealed that some agencies contacted OMB staff before official documents were submitted in some instances. This was reported by about 40 percent (7 of 17) of the officials we interviewed.

Other tactics to increase the likelihood of a favorable disposition include soliciting congressional support or appealing to the public (such as potentially affected groups) for support of the proposed data collection.[5] In 2 of 17 interviews, agency officials acknowledged attempts to enlist congressional support, but this was done rarely. In another case, an agency official reported that OMB's resistance to the collection of certain types of data led to the agency's receiving congressional support. In this instance, the conference report stated that it was the conferees' intent that the secretary of the department, not the director of OMB, determine whether there was a need for certain data to be collected. Seven of 17 agency officials indicated that they occasionally or rarely solicit support from the public.

As with the results for circumvention strategies, we found little evidence to suggest that agencies with low approval rates were more or less likely to employ any of these tactics.

Combined Use of Procedural Tactics

Unlike the circumvention strategies, the majority of agencies (9 of 17) reported using only one procedural strategy, in most cases that of asking for an expedited review. Five officials reported using two tactics—at least rarely. Only one agency official told us that they used all three tactics. The use of these strategies did not differ by agencies' approval rates.

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[5] This describes some results of our interviews with agency managers. In these interviews, managers were asked how frequently, if ever, they solicited congressional mandates.

Conclusions, Recommendations, and Agency Comments and Our Response

Conclusions

Our review of OMB and agency experience with the paperwork review process yields several conclusions. We found that OMB has established an orderly set of procedures for the submission and review of information collection proposals. However, the implementation of OMB's review procedures was not consistent. The criteria and information sources used to make decisions about the handling and disposition of proposed information collections varied among desk officers. They differed in the criteria they use to prioritize reviews and the sources from which they gathered information. OMB lacked sufficient formal procedural training to ensure consistent practices from one desk officer to the next. The problems caused by such inconsistency among desk officers were exacerbated by the rate of staff turnover among the officers. Most agencies we examined can expect to face a change in desk officers every few years, so that even if a collection has been previously approved, there is a high probability that the currently responsible desk officer is not familiar with it.

Although the great majority of reviews have been completed within the period called for by statute, in recent years the median duration of reviews has increased and more reviews have exceeded the 90-day maximum. The requirement for a public comment period on proposed collections has contributed to the increase in the duration of reviews (although few collections draw any public comments). Desk officer turnover also appeared to contribute to delays, in part because new desk officers were less likely to be familiar with any of the collections they were reviewing or with the agency personnel involved.

OMB's paperwork reviews have yielded some positive results. Some collections appeared to agency officials to have been improved as a result of formal or informal modifications brought about by OMB, and some redundant or unnecessary collections have been eliminated. However, the technical quality of OMB's reviews was uneven. OMB's reviews have led to technical improvements in some cases, but our assessment based on experts' ratings found that in several cases, OMB's reviews failed to prevent collections with serious technical flaws from going forward.

We found a considerable range of variation in the procedures agencies used to prepare collection proposals for review by OMB and in their experiences with the OMB review processes. A number of agencies have had virtually all their proposed collections approved by OMB without major modification. These tend to be agencies that

1. established parallel types of review, potentially duplicating OMB's function;

2. have provisions for technical review of collections when necessary;

3. provided written paperwork clearance guidelines;

4. provided considerable feedback on individual requests from the department clearance officer;

5. compiled examples of successful practices; and

6. communicated with OMB to monitor the progress or outcome of reviews.

For these agencies, regular OMB reviews appeared to have little effect on the quality or burden of their information collections. For these agencies, OMB review may be duplicative, adding time to the preparation of data collections without any real benefit.

However, some agencies have experienced greater difficulty in receiving approval for proposed information collections. Some agencies have well-developed procedures but had problems associated with differences of opinion with OMB regarding information collection issues. Here, the OMB review process interfered with data collection efforts of these agencies. More-consistent application of formal policies and quicker diagnosis of the sources of problems could improve the situation of these agencies.

Based on our assessment of a sample, there was considerable variation in the technical quality of information collections proposed by agencies. We found that some agencies could improve the quality of their information collections while controlling or reducing burden by

1. greater use of conventional statistical sampling methods,

2. focusing their data collection instruments more precisely on the issues of concern,

3. taking measures to improve response rates, and

4. taking steps to reduce or at least measure response biases in circumstances in which such biases appear plausible.

We also found that some agencies attempted to avoid OMB review through mechanisms that may decrease the quality and increase the cost of the information collected.

Finally, we found that some agencies have stopped collecting some data because of difficulties encountered in the clearance process. For these agencies, OMB's review has had a chilling effect on the likely availability of data. This effect has been pronounced for new collections and for research-oriented collections. Some agencies have indicated that information collection budget constraints have limited them to carrying out collections required by statute, while preventing them from performing program evaluations or collecting new data on problems arising within their areas of authority.

In light of these findings, we offer the following recommendations.

Recommendations

Given that many agencies have developed systematic procedures for reviewing data collection requests, we recommend that the director of OMB employ existing authority to delegate primary review responsibility to the senior officials within designated agencies that have demonstrated capability. The performance of these agencies could be monitored through spotchecks conducted by OMB. For executive agencies with less-effective internal means for procedural and technical review, we recommend that OMB help improve those means. We recommend that OMB enhance its guidance and assistance to agencies for improving the efficiency and quality of their data collections through increased use of conventional sampling procedures, measures to improve response rates, safeguards to control response bias or estimate the bias, and more precise design of data collection instruments.

To facilitate sound reviews within OMB, we recommend that the director of OMB develop an ongoing training program for the agency's paperwork review staff to ensure that technical and nontechnical criteria are appropriately and consistently applied to submissions. Further, we recommend that the director of OMB augment OIRA's capacity to perform technical reviews of new and recurrent collections. Measures appropriate to this end may include expansion of technical staff and consultation with external experts. Finally, we recommend that OMB conduct its review of information collection requests concurrently with the public comment period for these requests.

Agency Comments and Our Response

Commenting on a draft of this report, OMB concurred with all our recommendations. The office found them reasonable and consistent with its intent to improve further the administration of the information collection review process. (A copy of OMB's letter is in appendix IV.) However, OMB challenged four points in our report. First, using findings from the report, OMB asserted that its decisionmaking regarding information collection requests has been judicious and fair. Second, although it acknowledged that review periods exceeding 90 days are unacceptable and stated that it intends to correct this situation, it believes that increases in length of review time are consistent with the need for public input into the review process and are not always problematic, as we imply. Third, OMB disagreed with our assessment of the technical adequacy of its reviews, arguing that agreement between OMB and GAO was higher than we reported. It also cautioned that our sampling frame did not provide a basis for generalization. OMB thought it was unlikely that 70 percent of its approvals were associated with technically flawed collection efforts. Finally, OMB took issue with our claims about the chilling effect of the paperwork review process on the availability of information.

With regard to the first point—whether the process is judicious and fair—we did not say that the process was unfair or injudicious. However, we believe that OMB in making its case has overlooked several other findings in our report. As discussed throughout the report, a small fraction of agencies experienced considerable difficulty in gaining approval. For example, in one agency, only about 4 of every 10 submissions were approved. Factors other than the technical quality of submissions may contribute to such difficulties. These include differences of opinion between OMB and the agency on the type of information that should be collected. We believe that a fair process would not treat differently agencies with submissions of similar technical quality.

Furthermore, our interviews with desk officers strongly suggest that there was considerable variability in how these individuals judged the technical and nontechnical merits of submissions. It seems to us that a judicious review of information collection requests would be conducted by adequately trained reviewers who consistently applied accepted criteria and procedures.

With respect to OMB's second claim—the length of the review is not always a problem—we agree that ongoing collections are not as likely to be affected as new proposals. Further, we also agree that public participation is key to the review process but noted ways to improve the efficiency of reviews while obtaining such input. As for the "fast track" review procedures, our analyses show that agencies varied considerably in the frequency (ranging from never to frequently) with which they asked for expedited reviews. We do not know what accounts for this variability. Maybe some agencies were in no particular hurry, maybe they were unaware of these options, or maybe they have had limited success in achieving expedited reviews.

In its third point, OMB made two comments about our technical review of 17 information collection requests: (1) the final agreement rate was higher than we reported and (2) our sample of 17 was not selected in a way that would allow for generalization. In examining the correspondence between OMB's decisions to approve or disapprove requests and our judgments based on our experts' ratings, we reported agreement in only 6 of 17 cases (35 percent). We also noted that 3 of 4 requests that OMB disapproved were subsequently resubmitted and approved. Even including these three cases in the overall agreement rate does not alter our general conclusion: agreement was limited. That is, we agreed with OMB at best in only 9 of 17 cases (about 53-percent agreement). Further, these 3 cases do not affect our finding that in 7 of 17 cases, OMB approved requests we found technically flawed.

With respect to the point about our sample selection, we agree that our sampling plan does not allow for generalization to all approvals. We have not made such a statement. We believe the data that are presented are sufficient to justify concern about—and, indeed corrective actions on—the technical adequacy of reviews conducted within OMB. This concern is accentuated by our findings on (1) the limited technical backgrounds of some desk officers, (2) the infrequent use of formal technical materials as part of the review process, (3) insufficient input from the statistical policy branch to desk officers, and (4) limited training of newly recruited desk officers. These findings and the results of our technical review, we believe, increase the likelihood that the public is being requested to participate in data gathering activities that are sometimes below commonly accepted research and statistical standards. OMB's admission that it may have erred "on the side of giving the agency the benefit of the doubt in marginal situations" also supports our conclusion about the need to improve the technical review processes within OMB and within some agencies submitting the requests.

The final point raised by OMB concerns our conclusion that OMB has had a chilling effect on the availability of information. It states that discouraging

> "agencies whose proposals have higher-than-average disapproval rates based upon technical deficiencies, from continuing to seek to collect such data . . . may in fact have a salutary impact on American citizens."

If proposals from these agencies were disapproved primarily on the basis of technical considerations, we would agree. However, our analysis of the reasons for disapprovals obtained from the reports management system shows that the reasons most frequently given (for example, limited practical utility, the collection is not necessary) are based on less clear cut criteria, allowing the desk officer to exercise substantial personal discretion.

The majority of OMB's response regarding the chilling effect is devoted to providing alternative explanations or extenuating circumstances surrounding our illustrations. We have clarified earlier in this report that these illustrations represent the agencies' views of what transpired. Our analysis of the chilling effects of OMB on agency decisions acknowledged that there were many forces in operation that could influence agencies. To pare away some of these competing explanations, we relied on three methods, each with different methodological strengths and weaknesses. These included interviews, case studies, and longitudinal analyses of archival data contained in OMB's reports management system. For example, our statistical analyses based on the system's data imposed controls for general reductions in submissions, changes in classifications of information in the system, and other general trends (such as reductions in funds for information-gathering activities) that occurred between 1982 and 1987. While individual results can be challenged, we believe that, in combination, our illustrations, statistical analyses, and interviews suggest that agencies that have experienced difficulties gaining OMB approval have discontinued some of their efforts to collect information they believed was important in response to OMB's policies and practices.

Agencies Submitting Information Collection Requests to OMB 1982-87

Code	Agency type[a]	Abbreviation	Agency
0300	4	EOP	Executive Office of the President
0310	4	WHO	The White House Office
0348	3	OMB	Office of Management and Budget
0349	4	OSTP	Office of Science and Technology Policy
0350	4	TRADEREP	Office of the United States Trade Representative
0412	3	IDCA	United States International Development Cooperation Agency/Agency for International Development
0417	4	IAF	Inter-American Foundation
0420	3	PEACE	Peace Corps
			Department of Agriculture
0503	4	AgSEC	Office of the Secretary
0505	4	OFM	Office of Finance and Management
0506	4	AgGPA	Office of Governmental and Public Affairs
0507	4	TRANS	Office of Transportation
0518	4	ARS	Agricultural Research Service
0524	4	CSRS	Cooperative State Research Service
0525	4	OGPS	Office of Grants and Program Systems
0527	4	EXS	Extension Service
0535	2	SRS	National Agricultural Statistical Service
0536	3	ERS	Economic Research Service
0537	3	ACS	Agricultural Cooperative Service
0551	1	FAS	Foreign Agricultural Service
0560	1	ASCS	Agricultural Stabilization and Conservation Service
0563	4	FCIC	Federal Crop Insurance Corporation
0572	1	REA	Rural Electrification Administration
0575	1	FmHA	Farmers Home Administration
0576	4	ORDP	Office of Rural Development
0577	4	OICD	Office of International Cooperation and Development
0578	4	SCS	Soil Conservation Service
0579	1	APHIS	Animal and Plant Health Inspection Service
0580	4	FGIS	Federal Grain Inspection Service
0581	1	AMS	Agricultural Marketing Service
0583	1	FSIS	Food Safety and Inspection Service
0584	1	FNS	Food and Nutrition Service
0586	3	HNIS	Human Nutrition Information Service

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Code	Agency type[a]	Abbreviation	Agency
0590	4	P&SA	Packers and Stockyards Administration
0596	1	FS	Forest Service
			Department of Commerce
0605	3	ADMIN	General Administration
0607	2	CENSUS	Bureau of the Census
0608	2	EASA	Economic and Statistical Analysis
0610	1	EDA	Economic Development Administration
0625	1	ITA	International Trade Administration
0640	1	MBDA	Minority Business Development Agency
0648	1	NOAA	National Oceanic and Atmospheric Administration
0651	1	PTO	Patent and Trademark Office
0652	4	SATR	Science and Technical Research
0660	4	NTIA	National Telecommunications and Information Administration
0690	4	OS	Office of the Secretary
0691	•	BEA	Bureau of Economic Analysis (included in 0608 EASA)
0693	4	NBS	National Bureau of Standards
			Department of Defense
0701	3	AF	Department of the Air Force
0702	3	DOA	Department of the Army
0703	3	NAVY	Department of the Navy
0704	3	DODDEP	Departmental and Others
0790	4	OS	Office of the Secretary
			Department of Health and Human Services
0910	1	FDA	Food and Drug Administration
0915	3	HSA	Health Services Administration
0920	3	CDC	Centers for Disease Control
0925	3	NIH	National Institutes of Health
0930	3	ADAMHA	Alcohol, Drug Abuse, and Mental Health Administration
0935	4	HRA	Health Resources Administration
0937	2	OASH	Office of the Assistant Secretary for Health
0938	1	HCFA	Health Care Financing Administration
0960	1	SSA	Social Security Administration
0970	4	FSA	Family Support Administration
0980	1	HDSO	Office of Human Development Services
0990	3	HHSDM	Departmental Management

(continued)

Code	Agency type[a]	Abbreviation	Agency
0991	4	OS	Office of the Secretary
0992	4	OFA	Office of Family Assistance
			Department of Interior
1004	1	BLM	Bureau of Land Management
1006	1	RB	Bureau of Reclamation
1010	1	MMS	Minerals Management Service
1018	1	FWS	United States Fish and Wildlife Service
1024	1	NPS	National Park Service
1028	1	GS	Geological Survey
1029	1	OSMRE	Office of Surface Mining Reclamation and Enforcement
1032	3	MINES	Bureau of Mines
1076	1	BIA	Bureau of Indian Affairs
1090	4	ASPBA	Assistant Secretary for Policy, Budget, and Administration
1093	3	OS	Office of the Secretary
			Department of Justice
1103	4	DOJADM	General Administration
1105	3	LA	Legal Activities
1110	3	FBI	Federal Bureau of Investigation
1115	1	INS	Immigration and Naturalization Service
1117	1	DEA	Drug Enforcement Administration
1120	4	FP	Federal Prison System
1121	2	OJP	Office of Justice Programs
1190	4	CRT	Civil Rights Division
			Department of Labor
1205	1	ETA	Employment and Training Administration
1210	3	PWBA	Pension and Welfare Benefits Administration
1212	1	PBGC	Pension Benefit Guaranty Corporation
1214	4	LMRCP	Bureau of Labor Management Relations and Cooperative Programs
1215	1	ESA	Employment Standards Administration
1218	3	OSHA	Occupational Safety and Health Administration
1219	1	MSHA	Mine Safety and Health Administration
1220	2	BLS	Bureau of Labor Statistics
1225	3	DM	Departmental Management
1292	4	OIG	Office of the Inspector General

(continued)

Code	Agency type[a]	Abbreviation	Agency
1293	4	ASVET	Office of the Assistant Secretary for Veterans' Employment and Training
1400	4	STATE	Department of State
1405	3	AFA	Administration of Foreign Affairs
			Department of Treasury
1505	3	DO	Departmental Offices
1510	3	FMS.	Financial Management Service
1512	1	BATF	Bureau of Alcohol, Tobacco, and Firearms
1515	1	CUSTOMS	United States Customs Service
1520	4		Bureau of Engraving and Printing
1525	4	MINT	Bureau of the Mint
1535	3	BPD	Bureau of the Public Debt
1545	1	IRS	Internal Revenue Service
1557	1	OCC	Comptroller of the Currency
1800	4	ED	Department of Education
1801	4	EDMIS	Miscellaneous Department of Education
1810	3	OESE	Office of Elementary and Secondary Education
1820	3	OSERS	Office of Special Education and Rehabilitative Services
1830	3	OVAE	Office of Vocational and Adult Education
1840	3	OPE	Office of Postsecondary Education
1850	2	OERI	Office of Educational Research and Improvement
1860	4	EDSI	Office of Intergovernmental and Interagency Affairs
1870	4	OCR	Office of Civil Rights
1875	4	OPBE	Office of Planning and Budget and Evaluation
1880	3	EDMAN	Departmental Management
1885	3	BEMLA	Office of Bilingual Education and Minority Language Affairs
1892	4	EDIG	Office of Inspector General
			Department of Energy
1901	3	ENDEP	Departmental and Others
1902	1	FERC	Federal Energy Regulatory Commission
1903	3	ERA	Economic Regulatory Administration
1904	1	CE	Conservation and Renewable Energy
1905	2	EIA	Energy Information Administration

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Code	Agency type[a]	Abbreviation	Agency
1910	3		Office of Administration
2000	1	EPA	Environmental Protection Agency
2010	1	PPE	Policy Planning and Evaluation
2020	4	GCEC	General Counsel and Enforcement Counsel
2030	4	ARM	Administration and Resource Management
2040	1	WATER	Water
2050	1	SWER	Solid Waste and Emergency Response
2060	1	AR	Air and Radiation
2070	1	PTS	Pesticides and Toxic Substances
2080	1	RD	Research and Development
2090	4	AdmO	Office of the Administrator
			Department of Transportation
2105	3	OST	Office of the Secretary
2106	3		Office of the Secretary-Aviation
2115	1	USCG	U.S. Coast Guard
2120	1	FAA	Federal Aviation Administration
2125	1	FHWA	Federal Highway Administration
2127	1	NHTSA	National Highway Traffic Safety Administration
2130	1	FRA	Federal Railroad Administration
2132	1	UMTA	Urban Mass Transportation Administration
2133	1	MarAd	Maritime Administration
2135	4	SLSDC	Saint Lawrence Seaway Development Corporation
2137	3	RSPA	Research and Special Programs Administration
2138	3		Research and Special Programs Administration-Aviation
			Department of Housing and Urban Development
2501	4	HUDSEC	Office of the Secretary
2502	1	OH	Office of Housing
2503	1	GNMA	Government National Mortgage Association
2504	4	SEECB	Solar Energy and Energy Conservation Bank
2506	1	CPD	Office of Community Planning and Development
2508	4	HUDIG	Office of the Inspector General

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Code	Agency type[a]	Abbreviation	Agency
2510	4	HUDGC	Office of the General Counsel
2528	3	PD&R	Policy Development and Research
2529	1	FHEO	Office of Fair Housing and Equal Opportunity
2535	3	OA	Office of Administration
2577	3	PIH	Office of Public and Indian Housing
2700	3	NASA	National Aeronautics and Space Administration
2900	1	VA	Veterans Administration
3001	3	ACTION	ACTION
3002	4	ACUS	Administrative Conference of the United States
3014	4	ATBCB	Architectural and Transportation Barriers Compliance Board
3024	1	CAB	Civil Aeronautics Board
3035	4	CRC	Commission on Civil Rights
3037	4	CPBSH	Committee for Purchase from the Blind and Other Severely Handicapped
3038	1	CFTC	Commodity Futures Trading Commission
3041	1	CPSC	Consumer Product Safety Commission
3046	1	EEOC	Equal Employment Opportunity Commission
3048	4	EXIMBANK	Export-Import Bank of the United States
3060	1	FCC	Federal Communication Commission
3064	1	FDIC	Federal Deposit Insurance Corporation
3067	3	FEMA	Federal Emergency Management Agency
3068	1	FHLBB	Federal Home Loan Bank Board
3070	4	FLRA	Federal Labor Relations Authority
3072	1	FMC	Federal Maritime Commission
3076	4	FMCS	Federal Mediation and Conciliation Service
3084	1	FTC	Federal Trade Commission
3086	3		Foundation for Population Assistance
3090	3	GSA	General Services Administration
3095	4	NARA	National Archives and Records Administration
3116	3	USIA	United States Information Agency
3117	1	ITC	International Trade Commission
3120	1	ICC	Interstate Commerce Commission
3124	4	MSPB	Merit Systems Protection Board
3125	4	NCPC	National Capital Planning Commission
3133	1	NCUA	National Credit Union Administration
3135	3	NEA	National Endowment for the Arts

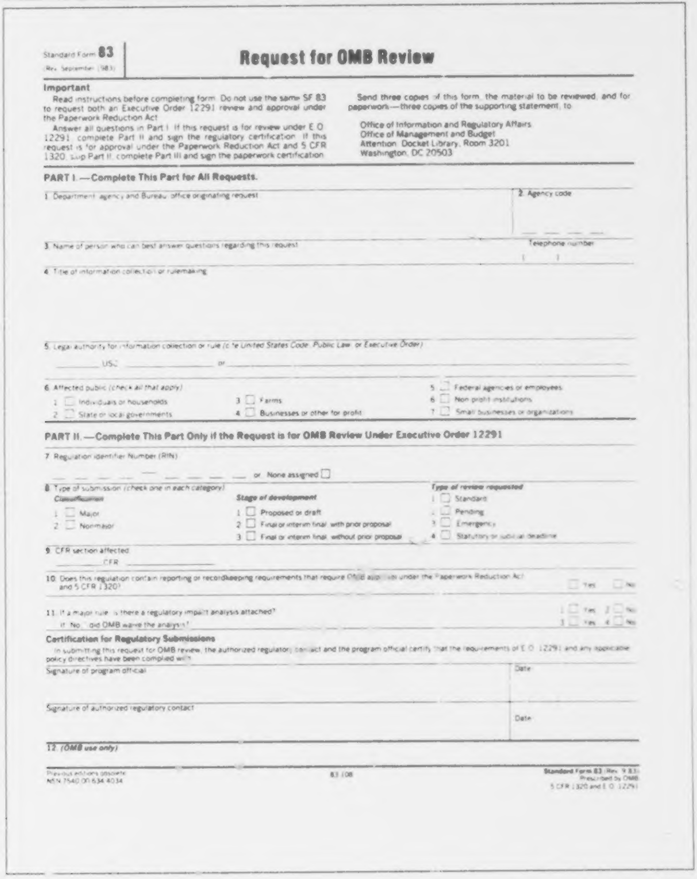
(continued)

Code	Agency type[a]	Abbreviation	Agency
3136	3	NEH	National Endowment for the Humanities
3137	3	IMS	Institute of Museum Services
3138	4	NIBS	National Institute of Building Sciences
3139	4	FFIEC	Federal Financial Institutions Examination Council
3140	4	NMB	National Mediation Board
3145	3	NSF	National Science Foundation
3147	4	NTSB	National Transportation Safety Board
3150	1	NRC	Nuclear Regulatory Commission
3200	4	OTHINDAG	Other Independent Agencies
3206	3	OPM	Office of Personnel Management
3207	4	PANAMA	Panama Canal Commission
3208	4	PADC	Pennsylvania Avenue Development Corporation
3220	3	RRB	Railroad Retirement Board
3235	1	SEC	Securities and Exchange Commission
3240	3	SSS	Selective Service System
3245	1	SBA	Small Business Administration
3250	4	SI	Smithsonian Institution
3312	4	OTHTEMPC	Other Temporary Commissions
3316	3	TVA	Tennessee Valley Authority
3420	3	OPIC	Overseas Private Investment Corporation
7100	1	FRS	Federal Reserve System
9000	4	FAR	DOD/GSA/NASA (FAR)

[a] 1 = regulatory, 2 = statistical, 3 = nonregulatory, 4 = other

Appendix II

SF-83 and Instructions



Standard Form **83**
(Rev. September 1983)

Request for OMB Review

Important

Read instructions before completing form. Do not use the same SF 83 to request both an Executive Order 12291 review and approval under the Paperwork Reduction Act.

Answer all questions in Part I. If this request is for review under E.O. 12291, complete Part II and sign the regulatory certification. If this request is for approval under the Paperwork Reduction Act and 5 CFR 1320, skip Part II, complete Part III and sign the paperwork certification.

Send three copies of this form, the material to be reviewed, and for paperwork—three copies of the supporting statement, to:

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Docket Library, Room 3201
Washington, DC 20503

PART I.—Complete This Part for All Requests.

1. Department/agency and Bureau/office originating request

2. Agency code
__ __ __ __

3. Name of person who can best answer questions regarding this request

Telephone number
( )

4. Title of information collection or rulemaking

5. Legal authority for information collection or rule (*cite United States Code, Public Law, or Executive Order*)

______ USC __________ or ____________________

6. Affected public (*check all that apply*)

1 ☐ Individuals or households
2 ☐ State or local governments
3 ☐ Farms
4 ☐ Businesses or other for profit
5 ☐ Federal agencies or employees
6 ☐ Non-profit institutions
7 ☐ Small businesses or organizations

PART II.—Complete This Part Only if the Request is for OMB Review Under Executive Order 12291

7. Regulation Identifier Number (RIN)

__ __ __ __ — __ __ __ __ or None assigned ☐

8. Type of submission (*check one in each category*)

Classification
1 ☐ Major
2 ☐ Nonmajor

Stage of development
1 ☐ Proposed or draft
2 ☐ Final or interim final, with prior proposal
3 ☐ Final or interim final, without prior proposal

Type of review requested
1 ☐ Standard
2 ☐ Pending
3 ☐ Emergency
4 ☐ Statutory or judicial deadline

9. CFR section affected

______ CFR __________

10. Does this regulation contain reporting or recordkeeping requirements that require OMB approval under the Paperwork Reduction Act and 5 CFR 1320? ☐ Yes ☐ No

11. If a major rule, is there a regulatory impact analysis attached? 1 ☐ Yes 2 ☐ No
If "No," did OMB waive the analysis? 3 ☐ Yes 4 ☐ No

Certification for Regulatory Submissions

In submitting this request for OMB review, the authorized regulatory contact and the program official certify that the requirements of E.O. 12291 and any applicable policy directives have been complied with.

Signature of program official
Date

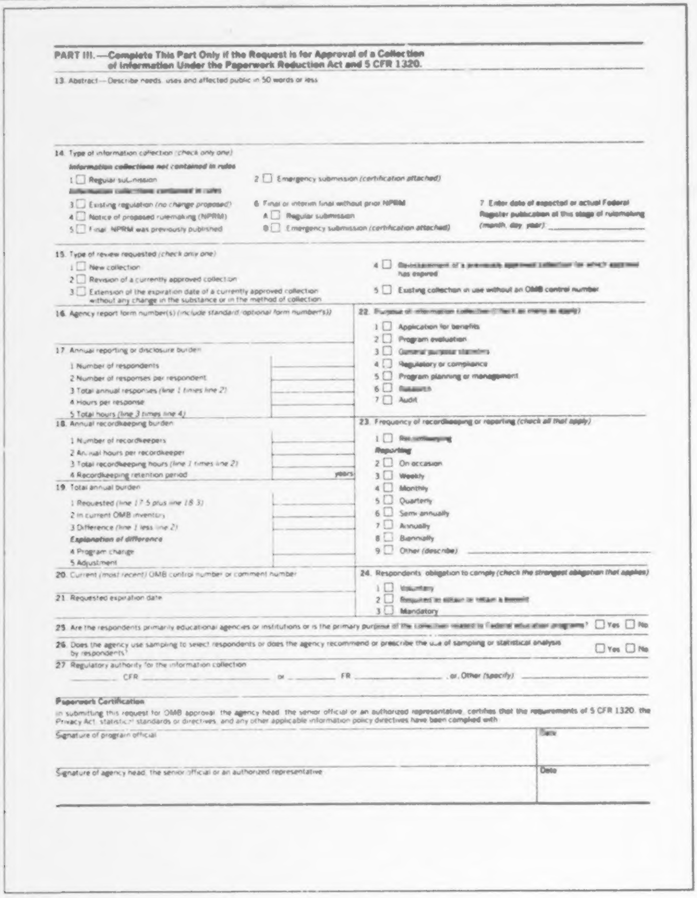
Signature of authorized regulatory contact
Date

12. ***(OMB use only)***

Previous editions obsolete
NSN 7540-00-634-4034

83-108

Standard Form 83 (Rev. 9-83)
Prescribed by OMB
5 CFR 1320 and E.O. 12291



PART III.—Complete This Part Only if the Request is for Approval of a Collection of Information Under the Paperwork Reduction Act and 5 CFR 1320.

13. Abstract—Describe needs, uses and affected public in 50 words or less

14. Type of information collection *(check only one)*

Information collections not contained in rules

1 ☐ Regular submission
2 ☐ Emergency submission *(certification attached)*

Information collections contained in rules

3 ☐ Existing regulation *(no change proposed)*
4 ☐ Notice of proposed rulemaking (NPRM)
5 ☐ Final, NPRM was previously published
6 Final or interim final without prior NPRM
A ☐ Regular submission
B ☐ Emergency submission *(certification attached)*
7 Enter date of expected or actual Federal Register publication at this stage of rulemaking *(month, day, year)*: ____________

15. Type of review requested *(check only one)*

1 ☐ New collection
2 ☐ Revision of a currently approved collection
3 ☐ Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection
4 ☐ Reinstatement of a previously approved collection for which approval has expired
5 ☐ Existing collection in use without an OMB control number

16. Agency report form number(s) *(include standard/optional form number(s))*

17. Annual reporting or disclosure burden
1 Number of respondents
2 Number of responses per respondent
3 Total annual responses *(line 1 times line 2)*
4 Hours per response
5 Total hours *(line 3 times line 4)*

18. Annual recordkeeping burden
1 Number of recordkeepers
2 Annual hours per recordkeeper
3 Total recordkeeping hours *(line 1 times line 2)*
4 Recordkeeping retention period ____ years

19. Total annual burden
1 Requested *(line 17.5 plus line 18.3)*
2 In current OMB inventory
3 Difference *(line 1 less line 2)*

Explanation of difference

4 Program change
5 Adjustment

20. Current *(most recent)* OMB control number or comment number

21. Requested expiration date

22. Purpose of information collection *(check as many as apply)*

1 ☐ Application for benefits
2 ☐ Program evaluation
3 ☐ General purpose statistics
4 ☐ Regulatory or compliance
5 ☐ Program planning or management
6 ☐ Research
7 ☐ Audit

23. Frequency of recordkeeping or reporting *(check all that apply)*

1 ☐ Recordkeeping

Reporting

2 ☐ On occasion
3 ☐ Weekly
4 ☐ Monthly
5 ☐ Quarterly
6 ☐ Semi-annually
7 ☐ Annually
8 ☐ Biennially
9 ☐ Other *(describe)* ____________

24. Respondents' obligation to comply *(check the strongest obligation that applies)*

1 ☐ Voluntary
2 ☐ Required to obtain or retain a benefit
3 ☐ Mandatory

25. Are the respondents primarily educational agencies or institutions or is the primary purpose of the collection related to Federal education programs? ☐ Yes ☐ No

26. Does the agency use sampling to select respondents or does the agency recommend or prescribe the use of sampling or statistical analysis by respondents? ☐ Yes ☐ No

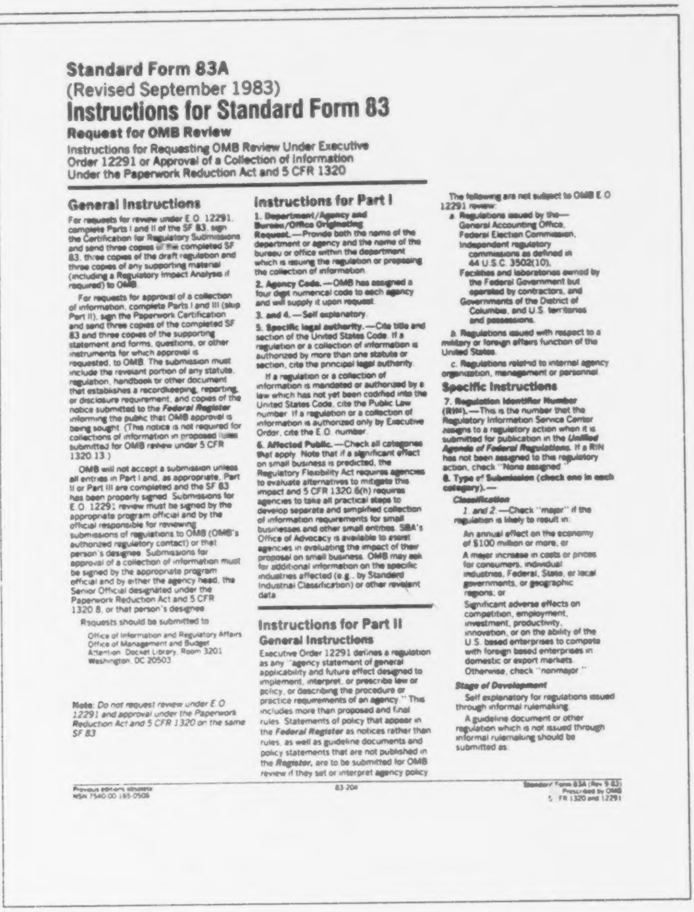
27. Regulatory authority for the information collection
________ CFR ____________ or ________ FR ____________, or, Other *(specify)* ____________

Paperwork Certification

In submitting this request for OMB approval, the agency head, the senior official or an authorized representative, certifies that the requirements of 5 CFR 1320, the Privacy Act, statistical standards or directives, and any other applicable information policy directives have been complied with.

Signature of program official | Date

Signature of agency head, the senior official or an authorized representative | Date



Standard Form 83A
(Revised September 1983)

Instructions for Standard Form 83

Request for OMB Review

Instructions for Requesting OMB Review Under Executive Order 12291 or Approval of a Collection of Information Under the Paperwork Reduction Act and 5 CFR 1320

General Instructions

For requests for review under E.O. 12291, complete Parts I and II of the SF 83, sign the Certification for Regulatory Submissions and send three copies of the completed SF 83, three copies of the draft regulation and three copies of any supporting material (including a Regulatory Impact Analysis if required) to OMB.

For requests for approval of a collection of information, complete Parts I and III (skip Part II), sign the Paperwork Certification and send three copies of the completed SF 83 and three copies of the supporting statement and forms, questions, or other instruments for which approval is requested, to OMB. The submission must include the revelant portion of any statute, regulation, handbook or other document that establishes a recordkeeping, reporting, or disclosure requirement, and copies of the notice submitted to the *Federal Register* informing the public that OMB approval is being sought. (This notice is not required for collections of information in proposed rules submitted for OMB review under 5 CFR 1320.13.)

OMB will not accept a submission unless all entries in Part I and, as appropriate, Part II or Part III are completed and the SF 83 has been properly signed. Submissions for E.O. 12291 review must be signed by the appropriate program official and by the official responsible for reviewing submissions of regulations to OMB (OMB's authorized regulatory contact) or that person's designee. Submissions for approval of a collection of information must be signed by the appropriate program official and by either the agency head, the Senior Official designated under the Paperwork Reduction Act and 5 CFR 1320.8, or that person's designee.

Requests should be submitted to:

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Docket Library, Room 3201
Washington, DC 20503

Note: *Do not request review under E.O. 12291 and approval under the Paperwork Reduction Act and 5 CFR 1320 on the same SF 83.*

Instructions for Part I

1. Department/Agency and Bureau/Office Originating Request.—Provide both the name of the department or agency and the name of the bureau or office within the department which is issuing the regulation or proposing the collection of information.

2. Agency Code.—OMB has assigned a four digit numerical code to each agency and will supply it upon request.

3. and 4.—Self explanatory.

5. Specific legal authority.—Cite title and section of the United States Code. If a regulation or a collection of information is authorized by more than one statute or section, cite the principal legal authority.

If a regulation or a collection of information is mandated or authorized by a law which has not yet been codified into the United States Code, cite the Public Law number. If a regulation or a collection of information is authorized only by Executive Order, cite the E.O. number.

6. Affected Public.—Check all categories that apply. Note that if a significant effect on small business is predicted, the Regulatory Flexibility Act requires agencies to evaluate alternatives to mitigate this impact and 5 CFR 1320.6(h) requires agencies to take all practical steps to develop seperate and simplified collection of information requirements for small businesses and other small entities. SBA's Office of Advocacy is available to assist agencies in evaluating the impact of their proposal on small business. OMB may ask for additional information on the specific industries affected (e.g., by Standard Industrial Classification) or other revelant data.

Instructions for Part II

General Instructions

Executive Order 12291 defines a regulation as any "agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy, or describing the procedure or practice requirements of an agency." This includes more than proposed and final rules. Statements of policy that appear in the *Federal Register* as notices rather than rules, as well as guideline documents and policy statements that are not published in the *Register*, are to be submitted for OMB review if they set or interpret agency policy.

The following are not subject to OMB E.O. 12291 review:

a. Regulations issued by the—
  General Accounting Office,
  Federal Election Commission,
  Independent regulatory
    commissions as defined in
    44 U.S.C. 3502(10),
  Facilities and laboratories owned by
    the Federal Government but
    operated by contractors, and
  Governments of the District of
    Columbia, and U.S. territories
    and possessions.

b. Regulations issued with respect to a military or foreign affairs function of the United States.

c. Regulations related to internal agency organization, management or personnel.

Specific Instructions

7. Regulation Identifier Number (RIN).—This is the number that the Regulatory Information Service Center assigns to a regulatory action when it is submitted for publication in the *Unified Agenda of Federal Regulations*. If a RIN has not been assigned to this regulatory action, check "None assigned."

8. Type of Submission (check one in each category).—

Classification

1. and 2.—Check "major" if the regulation is likely to result in:

An annual effect on the economy of $100 million or more, or

A major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions; or

Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the U.S. based enterprises to compete with foreign based enterprises in domestic or export markets.

Otherwise, check "nonmajor."

Stage of Development

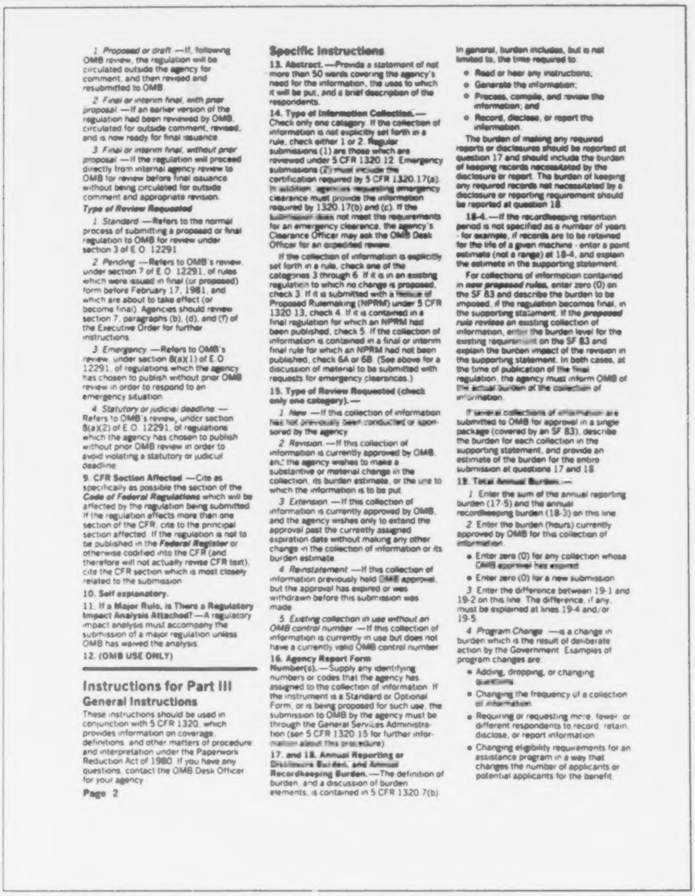
Self explanatory for regulations issued through informal rulemaking.

A guideline document or other regulation which is not issued through informal rulemaking should be submitted as:

Previous editions obsolete
NSN 7540-00-165-0506

83-204

Standard Form 83A (Rev. 9-83)
Prescribed by OMB
5 CFR 1320 and 12291



1. Proposed or draft.—If, following OMB review, the regulation will be circulated outside the agency for comment, and then revised and resubmitted to OMB.

2. Final or interim final, with prior proposal.—If an earlier version of the regulation had been reviewed by OMB, circulated for outside comment, revised, and is now ready for final issuance.

3. Final or interim final, without prior proposal.—If the regulation will proceed directly from internal agency review to OMB for review before final issuance without being circulated for outside comment and appropriate revision.

Type of Review Requested

1. Standard.—Refers to the normal process of submitting a proposed or final regulation to OMB for review under section 3 of E.O. 12291.

2. Pending.—Refers to OMB's review, under section 7 of E.O. 12291, of rules which were issued in final (or proposed) form before February 17, 1981, and which are about to take effect (or become final). Agencies should review section 7, paragraphs (b), (d), and (f) of the Executive Order for further instructions.

3. Emergency.—Refers to OMB's review, under section 8(a)(1) of E.O. 12291, of regulations which the agency has chosen to publish without prior OMB review in order to respond to an emergency situation.

4. Statutory or judicial deadline.—Refers to OMB's review, under section 8(a)(2) of E.O. 12291, of regulations which the agency has chosen to publish without prior OMB review in order to avoid violating a statutory or judicial deadline.

9. CFR Section Affected.—Cite as specifically as possible the section of the ***Code of Federal Regulations*** which will be affected by the regulation being submitted. If the regulation affects more than one section of the CFR, cite to the principal section affected. If the regulation is not to be published in the ***Federal Register*** or otherwise codified into the CFR (and therefore will not actually revise CFR text), cite the CFR section which is most closely related to the submission.

10. Self explanatory.

11. If a Major Rule, is There a Regulatory Impact Analysis Attached?—A regulatory impact analysis must accompany the submission of a major regulation unless OMB has waived the analysis.

12. (OMB USE ONLY)

Instructions for Part III

General Instructions

These instructions should be used in conjunction with 5 CFR 1320, which provides information on coverage, definitions, and other matters of procedure and interpretation under the Paperwork Reduction Act of 1980. If you have any questions, contact the OMB Desk Officer for your agency.

Page 2

Specific Instructions

13. Abstract.—Provide a statement of not more than 50 words covering the agency's need for the information, the uses to which it will be put, and a brief description of the respondents.

14. Type of Information Collection.—Check only one category. If the collection of information is not explicitly set forth in a rule, check either 1 or 2. Regular submissions (1) are those which are reviewed under 5 CFR 1320.12. Emergency submissions (2) must include the certification required by 5 CFR 1320.17(a). In addition, agencies requesting emergency clearance must provide the information required by 1320.17(b) and (c). If the submission does not meet the requirements for an emergency clearance, the agency's Clearance Officer may ask the OMB Desk Officer for an expedited review.

If the collection of information is explicitly set forth in a rule, check one of the categories 3 through 6. If it is in an existing regulation to which no change is proposed, check 3. If it is submitted with a Notice of Proposed Rulemaking (NPRM) under 5 CFR 1320.13, check 4. If it is contained in a final regulation for which an NPRM had been published, check 5. If the collection of information is contained in a final or interim final rule for which an NPRM had not been published, check 6A or 6B. (See above for a discussion of material to be submitted with requests for emergency clearances.)

15. Type of Review Requested (check only one category).—

1. New.—If this collection of information has not previously been conducted or sponsored by the agency.

2. Revision.—If this collection of information is currently approved by OMB, and the agency wishes to make a substantive or material change in the collection, its burden estimate, or the use to which the information is to be put.

3. Extension.—If this collection of information is currently approved by OMB, and the agency wishes only to extend the approval past the currently assigned expiration date without making any other change in the collection of information or its burden estimate.

4. Reinstatement.—If this collection of information previously held OMB approval, but the approval has expired or was withdrawn before this submission was made.

5. Existing collection in use without an OMB control number.—If this collection of information is currently in use but does not have a currently valid OMB control number.

16. Agency Report Form Number(s).—Supply any identifying numbers or codes that the agency has assigned to the collection of information. If the instrument is a Standard or Optional Form, or is being proposed for such use, the submission to OMB by the agency must be through the General Services Administration (see 5 CFR 1320.15 for further information about this procedure).

17. and 18. Annual Reporting or Disclosure Burden, and Annual Recordkeeping Burden.—The definition of burden, and a discussion of burden elements, is contained in 5 CFR 1320.7(b). In general, burden includes, but is not limited to, the time required to:

- Read or hear any instructions;
- Generate the information;
- Process, compile, and review the information; and
- Record, disclose, or report the information.

The burden of making any required reports or disclosures should be reported at question 17 and should include the burden of keeping records necessitated by the disclosure or report. The burden of keeping any required records not necessitated by a disclosure or reporting requirement should be reported at question 18.

18-4.—If the recordkeeping retention period is not specified as a number of years - for example, if records are to be retained for the life of a given machine - enter a point estimate (not a range) at 18-4, and explain the estimate in the supporting statement.

For collections of information contained in ***new proposed rules***, enter zero (0) on the SF 83 and describe the burden to be imposed, if the regulation becomes final, in the supporting statement. If the ***proposed rule revises*** an existing collection of information, enter the burden level for the existing requirement on the SF 83 and explain the burden impact of the revision in the supporting statement. In both cases, at the time of publication of the final regulation, the agency must inform OMB of the actual burden of the collection of information.

If several collections of information are submitted to OMB for approval in a single package (covered by an SF 83), describe the burden for each collection in the supporting statement, and provide an estimate of the burden for the entire submission at questions 17 and 18.

19. Total Annual Burden.—

1. Enter the sum of the annual reporting burden (17-5) and the annual recordkeeping burden (18-3) on this line.

2. Enter the burden (hours) currently approved by OMB for this collection of information.

- Enter zero (0) for any collection whose OMB approval has expired.
- Enter zero (0) for a new submission.

3. Enter the difference between 19-1 and 19-2 on this line. The difference, if any, must be explained at lines 19-4 and/or 19-5.

4. Program Change.—is a change in burden which is the result of deliberate action by the Government. Examples of program changes are:

- Adding, dropping, or changing questions.
- Changing the frequency of a collection of information.
- Requiring or requesting more, fewer, or different respondents to record, retain, disclose, or report information.
- Changing eligibility requirements for an assistance program in a way that changes the number of applicants or potential applicants for the benefit.

5. Adjustment.—is a change in burden which is not the result of deliberate agency action. Examples of adjustments are:

- Corrections of errors in burden estimates.
- Corrections of the record to provide an estimate of the burden for a collection of information currently in use without an OMB control number.
- Reestimates in burden due to factors outside the agency's control, such as population changes, a change in the number of firms in an industry, or a change in use because a different number of respondents decide to respond or to make use of the collection of information instrument.

20. Current (or most recent) OMB Control Number or Comment Number.—If the collection of information had previously received or now has an OMB control number or comment number, enter the number. If the collection has had different numbers, or has had both a control number and a comment number, enter the number that was most recently assigned.

21. Requested Expiration Date.—Enter the month and year through which OMB approval is requested. The date should be no more than three years from the expected date of OMB approval. For "emergency" approvals submitted under the provisions of 5 CFR 1320.17 the requested date should not be more than **90 days** after the date of OMB's receipt of the agency's submission.

22. Purpose.—

1. Application for benefits.—Is a collection of information which a person completes in order to participate in, receive, or qualify for a grant, financial assistance, or other benefit (including employment) from a Federal agency or program.

2. Program evaluation.—Is a formal assessment, through objective measures and systematic analysis, of the manner and extent to which Federal programs achieve their objectives or produce other significant effects. It is used to assist internal agency management and policy making.

3. General purpose statistics.—Are data collected chiefly for use by the public or for general government use, without primary reference to the policy or program operations of the agency collecting the data. This category should also be used to indicate activities required to design, manage, or evaluate general purpose statistical programs.

4. Regulatory or compliance.—Are collections of information undertaken for the purpose of measuring or enforcing compliance with laws or regulations. The category includes collections of information incidental to regulation, such as applications for waiver and exemptions. Applications for licenses, certificates, and the like, are also included in this category.

5. Program planning or management.—Includes all collections of information (other than program evaluation and audits) relating to progress reporting and grants management, financial and supply management, procurement and quality control, and other collections of administrative information that do not fit in any other category. This category also includes surveys and other collections of information used to develop new regulations or to review existing regulations.

6. Research.—Refers to collections of information to further the course of scientific or medical research, rather than for a specific program purpose.

7. Audits.—Refers to collections of information conducted for the purpose of verifying the accuracy of accounts and records.

23. Frequency of Recordkeeping or Reporting.—

1.—If the collection of information request or requirement explicitly includes a recordkeeping requirement, check this item. If the collection of information also includes a disclosure or reporting component, check the appropriate item 2 through 9.

2 through 9.—For collections of information that involve reporting, check the frequency of reporting that is requested or required of a respondent. If the reporting is on "an event" basis, check "on occasion" (item 2). Also check item 2 for all disclosure requirements.

24. Respondent's Obligation to Reply.—

1. Voluntary.—Means that response is entirely discretionary and has no direct effect on any benefit or privilege for the respondent.

2. Required to obtain or retain a benefit.—Means that the response is elective, but is required to obtain or retain a benefit. This includes licensing and permit requirements.

3. Mandatory.—Means that the respondent must reply or face civil or criminal sanctions. OMB will recognize a collection of information as being mandatory only if a statute expressly:

- Requires respondents to provide the information, or
- Authorizes an agency to require the respondents to provide the information.

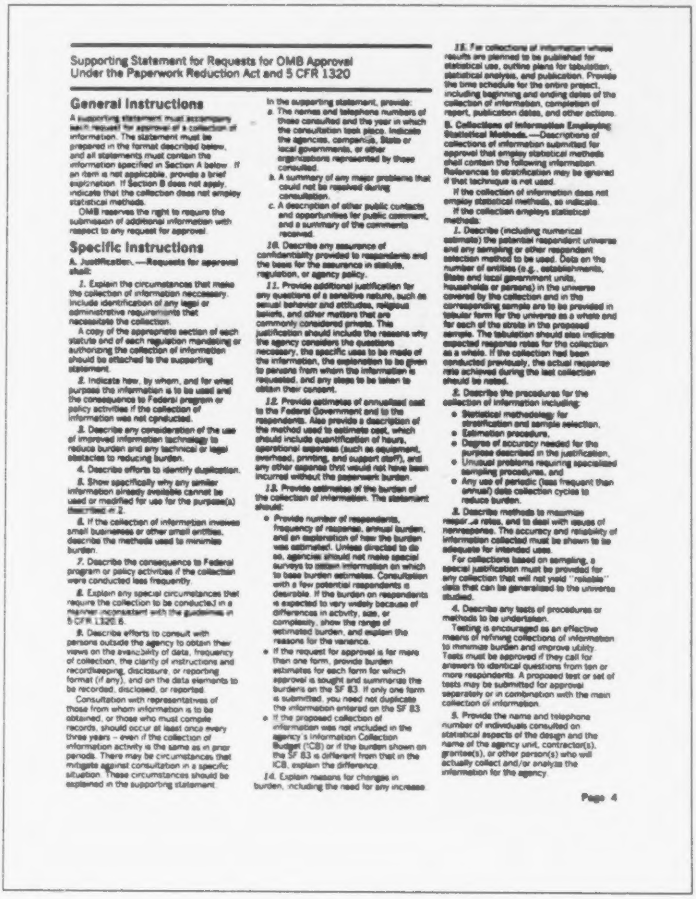
If more than one status applies (for example, the first page of a form is mandatory but the second page is optional), check the box which corresponds to the strongest obligation to respond. (Mandatory is the strongest obligation, and voluntary is the weakest.)

25. Self explanatory.

26. Does the Agency Use Sampling to Select Respondents or Does the Agency Recommend or Prescribe the Use of Sampling or Statistical Analysis by Respondents?—Check "Yes" if information is collected from a subset of all potential respondents on the basis of a selection made by the agency, and the results are used to infer the characteristics of the whole from the sample. Also check "Yes" if the respondents are asked or required to use similar sampling or other statistical techniques in generating or collecting the information requested or required by this collection.

27. Regulatory Authority for the Information Collection.—If the regulatory authority is contained in an existing regulation, cite as specifically as possible to the principal section of the *Code of Federal Regulations* which states the requirement. If the requirement is contained in a regulation that has not yet been codified into the CFR, cite the final rule and provide the date it appeared in the *Federal Register*.

A supporting statement, as described on page 4, must accompany each request for approval of a collection of information.



Supporting Statement for Requests for OMB Approval Under the Paperwork Reduction Act and 5 CFR 1320

General Instructions

A supporting statement must accompany each request for approval of a collection of information. The statement must be prepared in the format described below, and all statements must contain the information specified in Section A below. If an item is not applicable, provide a brief explanation. If Section B does not apply, indicate that the collection does not employ statistical methods.

OMB reserves the right to require the submission of additional information with respect to any request for approval.

Specific Instructions

A. Justification.—Requests for approval shall:

1. Explain the circumstances that make the collection of information necessary. Include identification of any legal or administrative requirements that necessitate the collection.

A copy of the appropriate section of each statute and of each regulation mandating or authorizing the collection of information should be attached to the supporting statement.

2. Indicate how, by whom, and for what purpose the information is to be used and the consequence to Federal program or policy activities if the collection of information was not conducted.

3. Describe any consideration of the use of improved information technology to reduce burden and any technical or legal obstacles to reducing burden.

4. Describe efforts to identify duplication.

5. Show specifically why any similar information already available cannot be used or modified for use for the purpose(s) described in 2.

6. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

7. Describe the consequence to Federal program or policy activities if the collection were conducted less frequently.

8. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.6.

9. Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained, or those who must compile records, should occur at least once every three years – even if the collection of information activity is the same as in prior periods. There may be circumstances that mitigate against consultation in a specific situation. These circumstances should be explained in the supporting statement.

In the supporting statement, provide:

a. The names and telephone numbers of those consulted and the year in which the consultation took place. Indicate the agencies, companies, State or local governments, or other organizations represented by those consulted.

b. A summary of any major problems that could not be resolved during consultation.

c. A description of other public contacts and opportunities for public comment, and a summary of the comments received.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

12. Provide estimates of annualized cost to the Federal Government and to the respondents. Also provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without the paperwork burden.

13. Provide estimates of the burden of the collection of information. The statement should:

- Provide number of respondents, frequency of response, annual burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not make special surveys to obtain information on which to base burden estimates. Consultation with a few potential respondents is desirable. If the burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated burden, and explain the reasons for the variance.
- If the request for approval is for more than one form, provide burden estimates for each form for which approval is sought and summarize the burdens on the SF 83. If only one form is submitted, you need not duplicate the information entered on the SF 83.
- If the proposed collection of information was not included in the agency's Information Collection Budget (ICB) or if the burden shown on the SF 83 is different from that in the ICB, explain the difference.

14. Explain reasons for changes in burden, including the need for any increase

15. For collections of information whose results are planned to be published for statistical use, outline plans for tabulation, statistical analysis, and publication. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

B. Collections of Information Employing Statistical Methods.—Descriptions of collections of information submitted for approval that employ statistical methods shall contain the following information. References to stratification may be ignored if that technique is not used.

If the collection of information does not employ statistical methods, so indicate.

If the collection employs statistical methods:

1. Describe (including numerical estimate) the potential respondent universe and any sampling or other respondent selection method to be used. Data on the number of entities (e.g., establishments, State and local government units, households or persons) in the universe covered by the collection and in the corresponding sample are to be provided in tabular form for the universe as a whole and for each of the strata in the proposed sample. The tabulation should also indicate expected response rates for the collection as a whole. If the collection had been conducted previously, the actual response rate achieved during the last collection should be noted.

2. Describe the procedures for the collection of information including:

- Statistical methodology for stratification and sample selection,
- Estimation procedure,
- Degree of accuracy needed for the purpose described in the justification,
- Unusual problems requiring specialized sampling procedures, and
- Any use of periodic (less frequent than annual) data collection cycles to reduce burden.

3. Describe methods to maximize response rates, and to deal with issues of nonresponse. The accuracy and reliability of information collected must be shown to be adequate for intended uses.

For collections based on sampling, a special justification must be provided for any collection that will not yield "reliable" data that can be generalized to the universe studied.

4. Describe any tests of procedures or methods to be undertaken.

Testing is encouraged as an effective means of refining collections of information to minimize burden and improve utility. Tests must be approved if they call for answers to identical questions from ten or more respondents. A proposed test or set of tests may be submitted for approval separately or in combination with the main collection of information.

5. Provide the name and telephone number of individuals consulted on statistical aspects of the design and the name of the agency unit, contractor(s), grantee(s), or other person(s) who will actually collect and/or analyze the information for the agency.

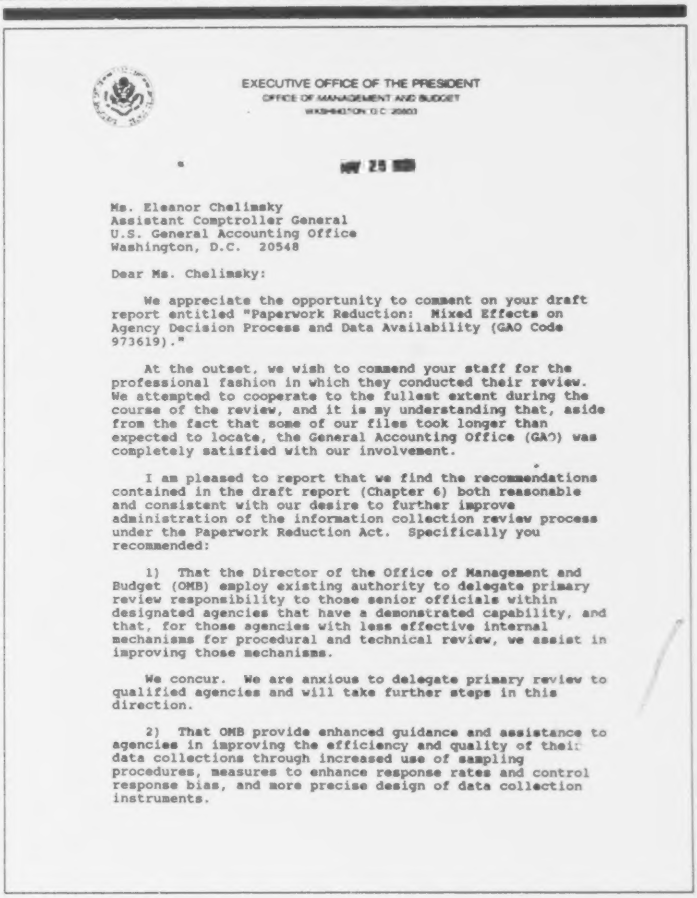
Page 4

Appendix III

Panel of GAO Experts

Ms. Doris Northrup	President, CODA, Inc.
Dr. Peter Rossi	Distinguished Professor of Sociology, University of Massachusetts, Amherst
Dr. Lee Sechrest	Professor, Department of Psychology, University of Arizona

Comments From the Office of Management and Budget



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MAY 25 [illegible]

Ms. Eleanor Chelimsky
Assistant Comptroller General
U.S. General Accounting Office
Washington, D.C. 20548

Dear Ms. Chelimsky:

We appreciate the opportunity to comment on your draft report entitled "Paperwork Reduction: Mixed Effects on Agency Decision Process and Data Availability (GAO Code 973619)."

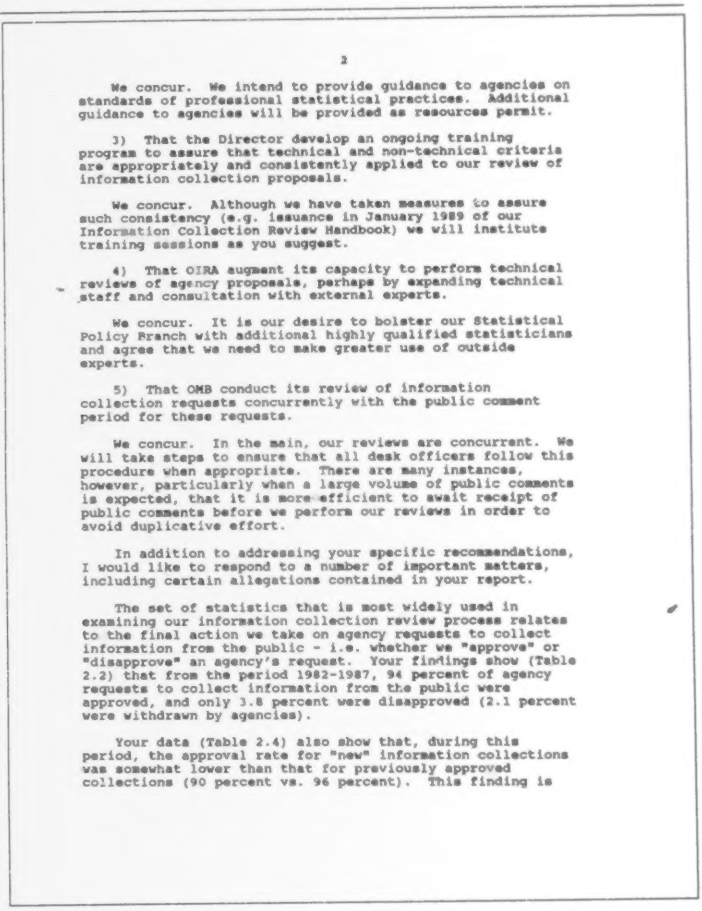
At the outset, we wish to commend your staff for the professional fashion in which they conducted their review. We attempted to cooperate to the fullest extent during the course of the review, and it is my understanding that, aside from the fact that some of our files took longer than expected to locate, the General Accounting Office (GAO) was completely satisfied with our involvement.

I am pleased to report that we find the recommendations contained in the draft report (Chapter 6) both reasonable and consistent with our desire to further improve administration of the information collection review process under the Paperwork Reduction Act. Specifically you recommended:

1) That the Director of the Office of Management and Budget (OMB) employ existing authority to delegate primary review responsibility to those senior officials within designated agencies that have a demonstrated capability, and that, for those agencies with less effective internal mechanisms for procedural and technical review, we assist in improving those mechanisms.

We concur. We are anxious to delegate primary review to qualified agencies and will take further steps in this direction.

2) That OMB provide enhanced guidance and assistance to agencies in improving the efficiency and quality of their data collections through increased use of sampling procedures, measures to enhance response rates and control response bias, and more precise design of data collection instruments.



We concur. We intend to provide guidance to agencies on standards of professional statistical practices. Additional guidance to agencies will be provided as resources permit.

3) That the Director develop an ongoing training program to assure that technical and non-technical criteria are appropriately and consistently applied to our review of information collection proposals.

We concur. Although we have taken measures to assure such consistency (e.g. issuance in January 1989 of our Information Collection Review Handbook) we will institute training sessions as you suggest.

4) That OIRA augment its capacity to perform technical reviews of agency proposals, perhaps by expanding technical staff and consultation with external experts.

We concur. It is our desire to bolster our Statistical Policy Branch with additional highly qualified statisticians and agree that we need to make greater use of outside experts.

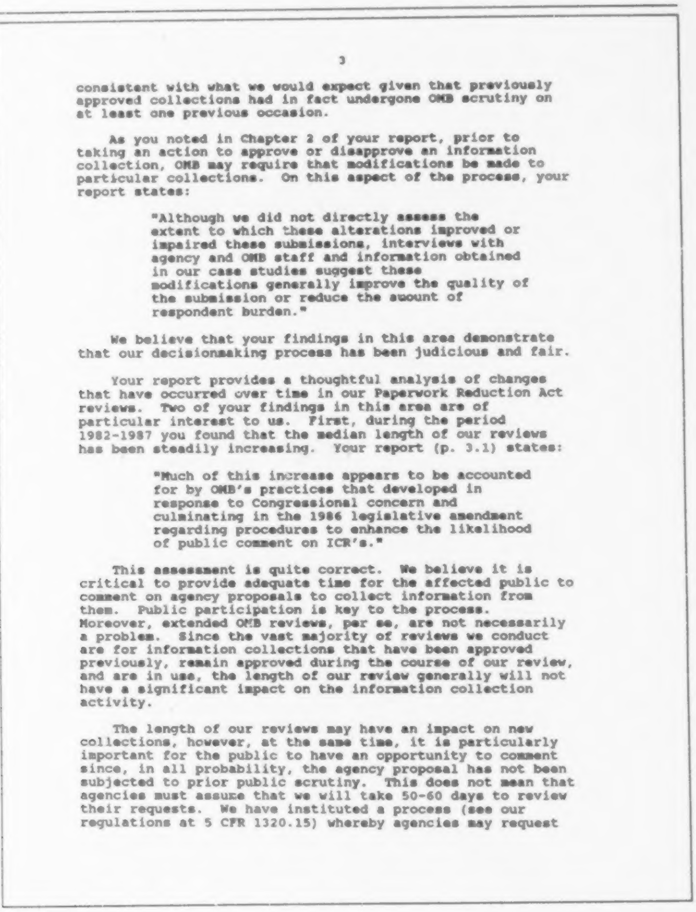
5) That OMB conduct its review of information collection requests concurrently with the public comment period for these requests.

We concur. In the main, our reviews are concurrent. We will take steps to ensure that all desk officers follow this procedure when appropriate. There are many instances, however, particularly when a large volume of public comments is expected, that it is more efficient to await receipt of public comments before we perform our reviews in order to avoid duplicative effort.

In addition to addressing your specific recommendations, I would like to respond to a number of important matters, including certain allegations contained in your report.

The set of statistics that is most widely used in examining our information collection review process relates to the final action we take on agency requests to collect information from the public - i.e. whether we "approve" or "disapprove" an agency's request. Your findings show (Table 2.2) that from the period 1982-1987, 94 percent of agency requests to collect information from the public were approved, and only 3.8 percent were disapproved (2.1 percent were withdrawn by agencies).

Your data (Table 2.4) also show that, during this period, the approval rate for "new" information collections was somewhat lower than that for previously approved collections (90 percent vs. 96 percent). This finding is



consistent with what we would expect given that previously approved collections had in fact undergone OMB scrutiny on at least one previous occasion.

See p. 29

As you noted in Chapter 2 of your report, prior to taking an action to approve or disapprove an information collection, OMB may require that modifications be made to particular collections. On this aspect of the process, your report states:

> "Although we did not directly assess the extent to which these alterations improved or impaired these submissions, interviews with agency and OMB staff and information obtained in our case studies suggest these modifications generally improve the quality of the submission or reduce the amount of respondent burden."

We believe that your findings in this area demonstrate that our decisionmaking process has been judicious and fair.

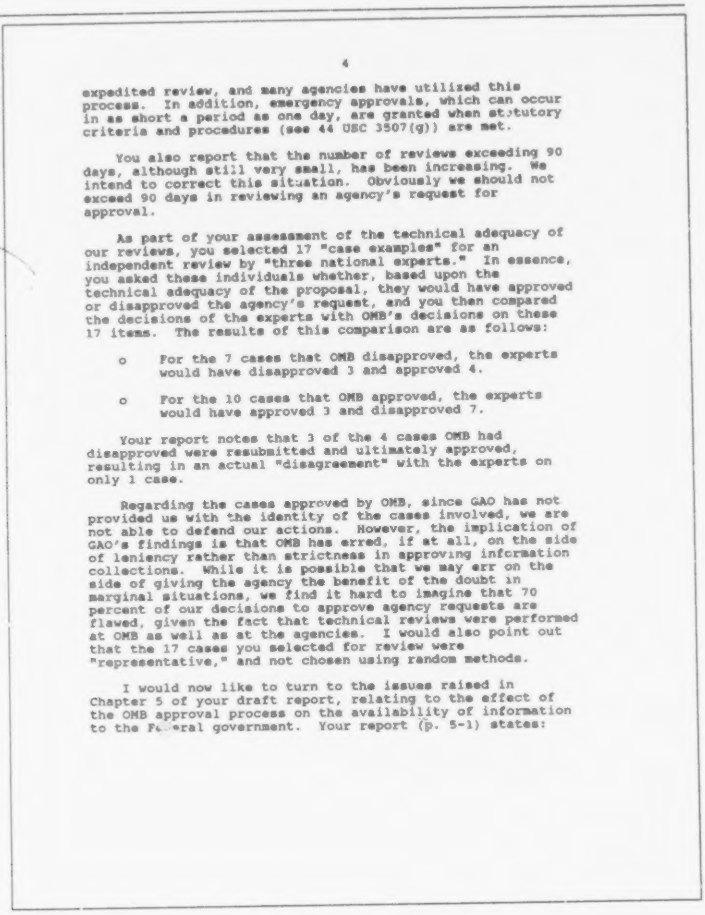
Now p. 33

Your report provides a thoughtful analysis of changes that have occurred over time in our Paperwork Reduction Act reviews. Two of your findings in this area are of particular interest to us. First, during the period 1982-1987 you found that the median length of our reviews has been steadily increasing. Your report (p. 3.1) states:

> "Much of this increase appears to be accounted for by OMB's practices that developed in response to Congressional concern and culminating in the 1986 legislative amendment regarding procedures to enhance the likelihood of public comment on ICR's."

This assessment is quite correct. We believe it is critical to provide adequate time for the affected public to comment on agency proposals to collect information from them. Public participation is key to the process. Moreover, extended OMB reviews, per se, are not necessarily a problem. Since the vast majority of reviews we conduct are for information collections that have been approved previously, remain approved during the course of our review, and are in use, the length of our review generally will not have a significant impact on the information collection activity.

The length of our reviews may have an impact on new collections, however, at the same time, it is particularly important for the public to have an opportunity to comment since, in all probability, the agency proposal has not been subjected to prior public scrutiny. This does not mean that agencies must assume that we will take 50-60 days to review their requests. We have instituted a process (see our regulations at 5 CFR 1320.15) whereby agencies may request



expedited review, and many agencies have utilized this process. In addition, emergency approvals, which can occur in as short a period as one day, are granted when statutory criteria and procedures (see 44 USC 3507(g)) are met.

You also report that the number of reviews exceeding 90 days, although still very small, has been increasing. We intend to correct this situation. Obviously we should not exceed 90 days in reviewing an agency's request for approval.

As part of your assessment of the technical adequacy of our reviews, you selected 17 "case examples" for an independent review by "three national experts." In essence, you asked these individuals whether, based upon the technical adequacy of the proposal, they would have approved or disapproved the agency's request, and you then compared the decisions of the experts with OMB's decisions on these 17 items. The results of this comparison are as follows:

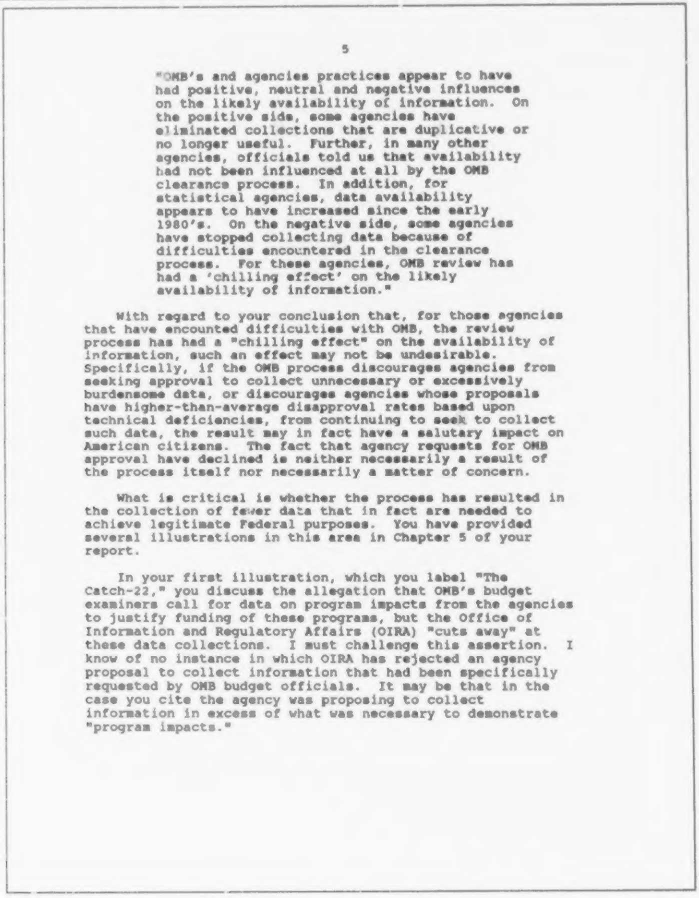
- For the 7 cases that OMB disapproved, the experts would have disapproved 3 and approved 4.
- For the 10 cases that OMB approved, the experts would have approved 3 and disapproved 7.

Your report notes that 3 of the 4 cases OMB had disapproved were resubmitted and ultimately approved, resulting in an actual "disagreement" with the experts on only 1 case.

Regarding the cases approved by OMB, since GAO has not provided us with the identity of the cases involved, we are not able to defend our actions. However, the implication of GAO's findings is that OMB has erred, if at all, on the side of leniency rather than strictness in approving information collections. While it is possible that we may err on the side of giving the agency the benefit of the doubt in marginal situations, we find it hard to imagine that 70 percent of our decisions to approve agency requests are flawed, given the fact that technical reviews were performed at OMB as well as at the agencies. I would also point out that the 17 cases you selected for review were "representative," and not chosen using random methods.

Now p. 48.

I would now like to turn to the issues raised in Chapter 5 of your draft report, relating to the effect of the OMB approval process on the availability of information to the Federal government. Your report (p. 5-1) states:



> "OMB's and agencies practices appear to have had positive, neutral and negative influences on the likely availability of information. On the positive side, some agencies have eliminated collections that are duplicative or no longer useful. Further, in many other agencies, officials told us that availability had not been influenced at all by the OMB clearance process. In addition, for statistical agencies, data availability appears to have increased since the early 1980's. On the negative side, some agencies have stopped collecting data because of difficulties encountered in the clearance process. For these agencies, OMB review has had a 'chilling effect' on the likely availability of information."

With regard to your conclusion that, for those agencies that have encounted difficulties with OMB, the review process has had a "chilling effect" on the availability of information, such an effect may not be undesirable. Specifically, if the OMB process discourages agencies from seeking approval to collect unnecessary or excessively burdensome data, or discourages agencies whose proposals have higher-than-average disapproval rates based upon technical deficiencies, from continuing to seek to collect such data, the result may in fact have a salutary impact on American citizens. The fact that agency requests for OMB approval have declined is neither necessarily a result of the process itself nor necessarily a matter of concern.

What is critical is whether the process has resulted in the collection of fewer data that in fact are needed to achieve legitimate Federal purposes. You have provided several illustrations in this area in Chapter 5 of your report.

In your first illustration, which you label "The Catch-22," you discuss the allegation that OMB's budget examiners call for data on program impacts from the agencies to justify funding of these programs, but the Office of Information and Regulatory Affairs (OIRA) "cuts away" at these data collections. I must challenge this assertion. I know of no instance in which OIRA has rejected an agency proposal to collect information that had been specifically requested by OMB budget officials. It may be that in the case you cite the agency was proposing to collect information in excess of what was necessary to demonstrate "program impacts."

6

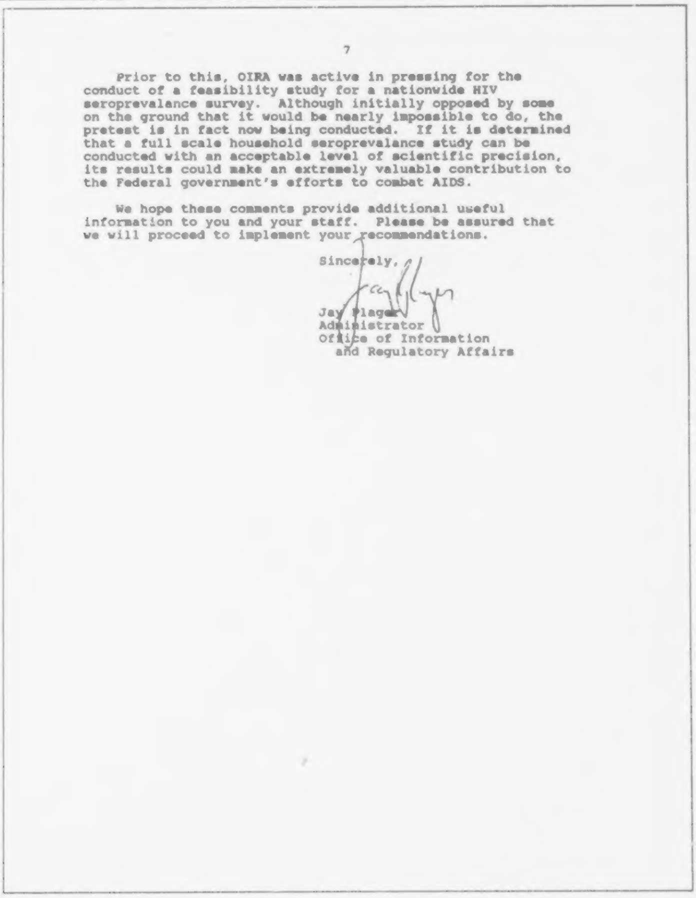
Your second illustration is labeled "Active Discouragement." Here, you quote an agency official who stated that information had not been gathered in a particular area because of OMB's alleged position that "the less information collected about this area the better." I do not know whether such a statement was uttered by an OMB employee. If it was, it was inappropriate. What is not inappropriate, however, is a determination, which we are required to make under the Paperwork Reduction Act, as to whether an information collection, or an area of information collection, by an agency is necessary. Discouraging agencies from collecting data that are unnecessary or that do not have practical utility is, in my view, clearly consistent with our statutory mandate.

The third illustration you present is labeled "Small Studies Abandoned." The essence of this illustration is that some information collections requiring fast-turnaround are not undertaken because of the time required to develop a request for and obtain OMB approval. While we cannot dispute that this may have occurred, it is important to note that we have taken steps, through the establishment of the expedited approval process referred to above, to provide a mechanism to respond to agency needs to collect information on a rapid basis. All agencies may avail themselves of this process. In addition, several agencies including the Food and Drug Administration and the National Center for Education Statistics, have raquested and received approval for "fast track surveys" that permit them to collect important data from the public in a very rapid fashion.

See p. 50

See p. 50

Your final illustration is labeled "Developmental Research." In this section you state an agency official's claim that "OMB's criteria thwart the developmental process of research . . . ." As the sole example of this alleged problem your report states "The area of AIDS and estimates of transmission by drug users to the heterosexual population was cited as an example of an area and a type of research that is just not done because of OMB review requirements." We believe this is not a fair characterization. First, the vast majority of research on AIDS is funded through grants, and is not, under our regulations, subject to OMB review. Second, you should be aware that we have taken an active role in supporting the limited amount of AIDS research that is subject to our review. For example, in November 1988 I wrote to Robert Windom, M.D., then Assistant Secretary of Health at the Department of Health and Human Services (HHS) suggesting that we meet to discuss coordinating the collection of AIDS-related data. During a full day briefing on this subject OMB and HHS came to a clear understanding about the OMB process and how it could function to expedite requests for approval of AIDS-related research.



Prior to this, OIRA was active in pressing for the conduct of a feasibility study for a nationwide HIV seroprevalance survey. Although initially opposed by some on the ground that it would be nearly impossible to do, the pretest is in fact now being conducted. If it is determined that a full scale household seroprevalance study can be conducted with an acceptable level of scientific precision, its results could make an extremely valuable contribution to the Federal government's efforts to combat AIDS.

We hope these comments provide additional useful information to you and your staff. Please be assured that we will proceed to implement your recommendations.

Sincerely,

Jay Plager
Administrator
Office of Information
and Regulatory Affairs

Appendix V

Major Contributors to This Report

Program Evaluation and Methodology Division

David S. Cordray, Assistant Director of Program Evaluation in Human Services Areas
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United States General Accounting Office

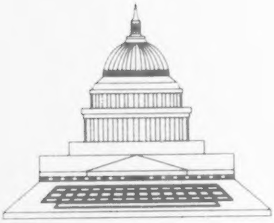
GAO

Information Management and
Technology Division

February 1990

Meeting the Government's Technology Challenge

Results of A GAO Symposium



GAO/IMTEC-90-23

Preface

Managing the federal government's information technology is a monumental task. Over 53,000 government computer and telecommunications systems touch the lives of Americans each day. As we stand on the brink of a new decade, the government is facing the enormous challenge of modernizing many of these vital systems to ensure that the public receives the services they expect and deserve. Although the federal government is spending about $20 billion annually for this purpose, progress has been painfully slow.

We cannot afford this lack of progress. With forecasts of tighter budgets and a shrinking labor force, the government will soon have to meet the needs of the American taxpayer with less funding and fewer trained employees. Government leaders must increasingly rely upon information technology to streamline operations, improve service to the public, and handle the accelerating rate of change that will undoubtedly face government in the 1990s.

On October 4 and 5, 1989, GAO sponsored a symposium, "Meeting the Government's Technology Challenge," that brought together leaders from industry and government to explore ways of better using information technology to meet the demands facing the government into the next century. This report builds on the symposium's results to provide a framework for acquiring and managing information technology. We believe this framework offers an appropriate starting point for addressing the technology challenge facing the government now and in the future.

Charles A. Bowsher

Charles A. Bowsher
Comptroller General
of the United States

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Abbreviations

ADP	Automatic Data Processing, Inc.
IMTEC	Information Management and Technology Division
GAO	General Accounting Office
USAA	United Services Automobile Association

Meeting the Government's Technology Challenge

Information technology systems are the lifeblood of the federal government, sustaining vital functions such as tax collection, aid to our elderly and disadvantaged citizens, and national defense. Yet it is becoming increasingly clear that many of these systems are approaching a state of crisis. Some of the most critical ones, such as those used by the Internal Revenue Service to process taxes, were designed almost 30 years ago and rely on antiquated equipment and outdated designs. Given the likelihood of continuing population increases, the demand for government services may outstrip the processing capability of many of today's systems before the end of this century.

Attempts to modernize the government's information systems have produced few successes and many costly failures. Over the past several years GAO has found skyrocketing costs, long delays, and elusive benefits to be characteristic of far too many information technology projects. The causes most often cited for this bleak history are a lack of effective leadership by senior managers, ineffective communication among those involved in developing information systems, incomplete knowledge of the customer's needs, the absence of a clear and complete systems plan or architecture, and frequent turnover among project managers and other key personnel. This record of failure has resulted in a lack of public confidence regarding the government's ability to manage information systems projects. In light of the current budget deficit and the growing demand for government services, federal managers must find a way to break this cycle of failure and begin creating a workable strategy for meeting the demands of the future.

The GAO Symposium: Focusing on the Technology Challenge

Modernizing the federal government's information technology is an enormous and complex undertaking. Given the government's disappointing record in this area, a consensus has been building among federal leaders that new ways of addressing this challenge must be explored. In October 1989 GAO convened a symposium, "Meeting the Government's Technology Challenge," to foster new ideas and fresh approaches to developing and managing the government's information technology systems. By bringing together leaders from industry, the Congress, and the executive agencies, we sought to begin a dialogue involving the major parties involved in helping the federal government use technology to meet the nation's needs. Dr. Peter Keen, Executive Director of the International Center for Information Technologies, moderated the symposium.

During the 2-day event, participants explored information technology issues and debated ways to ensure that the government will receive the greatest benefit for its information technology investments. To begin the symposium, speakers from private industry who had been highly successful in developing information technology systems recounted their experiences. Their presentations were particularly pertinent because the challenges facing these organizations were similar to those confronting the government; each was involved in delivering services to the public that required processing large amounts of data in short amounts of time. The speakers and the organizations they represent were General Donald Lasher (ret.), President for Information Systems, United Services Automobile Association (USAA); John Fisher, Senior Vice President, Banc One Corporation; Jim Grant, Executive Vice President for Systems and Technology, The Royal Bank of Canada; and Barry Kotar, President and Chief Executive Officer, Covia Corporation. Appendix I contains additional information on these speakers.

Following the industry speakers, panels composed of representatives from federal agencies, congressional committees, private industry, and academia discussed alternatives for addressing the federal government's dilemma. The ideas generated in the panels were then debated during a plenary session. Appendix II contains a listing of the panelists. Senator Frank Lautenberg of New Jersey and Representative Edward Markey of Massachusetts offered congressional perspectives on the information technology challenge. Additional information on these speakers is provided in appendix III.

Symposium Results: Principles for Managing Information Technology

Five principles for effective management of information technology emerged during the symposium. Together they provide a framework for successfully integrating information technology into the business of government. GAO's experiences over the years in reviewing the government's use of this technology has confirmed the validity of these principles. GAO suggests that agency heads examine their use of information technology and apply the following principles when developing and managing their technology plans.

Principle 1: Commitment and Vision Begin at the Top

Most successful automation efforts begin with a top manager who has a clear vision of how the organization can benefit from information technology and a commitment to making this vision a reality. Without clear direction and support from the top, modernization programs tend to degenerate into loose collections of independent systems. Often these systems are developed under the oversight of technical managers who focus on the needs of their individual units rather than the organization's larger mission and goals. The net result is that the systems that are developed do not effectively meet the organization's or the public's needs.

The importance of visionary leadership was clearly illustrated by John Fisher of Banc One in describing the financial services industry. During the last decade—when many banks were losing ground to their competitors—bank managers were repeatedly criticized as lacking vision. An important aspect of this lack of vision was the bank managers' reluctance to embrace the promise of technology. He noted that this situation has recently changed, with many banks viewing technology as a strategic tool enabling them to stay ahead of the competition. Mr. Fisher suggested that the federal government's need for visionary leadership was analogous to the banking environment during the last decade.

Senior managers should examine their missions and begin to look forward—beyond the next budget cycle—to find the best way of serving the needs of the public in the future. Instead of simply automating existing processes and procedures, leaders need to take a fresh look at alternative ways of accomplishing their goals and embody this new thinking into a vision that can guide systems development over the long term. According to General Lasher of USAA, if information systems are developed in concert with a clear long-range vision, they become the organization's "strategic weapon" for effectively accomplishing its goals.

Leaders need to take a fresh look at alternative ways of accomplishing their goals, instead of simply automating existing processes and procedures.

After examining their mission in light of the public's future needs, agency leaders should prepare clear, forward-looking statements articulating the vision. Such a statement should describe what services the agency is to provide now and in the future and present critical milestones for implementing the vision. Specific technology plans should then be developed that will transform this vision into reality.

The agency's senior official for information resources management should play a leading role in these activities. Specifically, this official should assist in defining the vision and preparing the agency's technology plan, and then ensure that the ongoing and proposed systems development projects fall logically within this plan. The symposium participants reached a consensus that agencies need to redefine the role of the senior information resources management official and elevate the authority of this position to ensure that these responsibilities are fulfilled.

Principle 2: Partnerships Can Help Define the Vision

Having access to the best available knowledge and advice from government, industry, and academia is critical when establishing the vision and the supporting architecture.

Forging alliances and cultivating partnerships is an essential part of defining and implementing an agency's strategic vision. Having access to the best available knowledge and advice from government, industry, and academia is critical when establishing the vision and the supporting architecture. Advisory panels, private consulting firms, research foundations, and other government agencies can provide fresh, independent perspectives and new insights. Alliances with external organizations such as these were cited by symposium participants as being invaluable.

Within an organization, partnerships between program offices and technical groups, at all levels, can promote effective communication and cooperative working relationships. Agencies should establish such partnerships as a means of ending the artificial and damaging split between technical planning and program implementation. Jim Grant of The Royal Bank of Canada noted that allowing both groups—technical and program—to actively participate on architectural planning committees almost guarantees that concerns, ideas, and solutions from both sides will be aired and addressed.

General Lasher echoed this approach for establishing organizational partnerships. USAA has created an "executive partnership" among senior managers from both program units and systems groups that promotes a cooperative environment. Representing top management, USAA's Architecture Review Board regularly convenes to ensure that stated policies and information technology projects conform to the organization's vision for the future. The consensus among the symposium participants was that agency officials should establish similar boards to ensure that the guiding vision is realized.

Agency leaders should also involve the Congress as an active partner in defining and implementing their vision. Top management must clearly articulate to the Congress how the vision will help achieve the agency's mission and describe how each major information technology project will contribute to realizing the vision. It is particularly important that the information provided to decisionmakers is as complete and realistic as possible. Further, agency management needs to evaluate and discuss with the Congress the impact its vision will have on the organizational structure and congressional constituencies. Technological change often entails organizational change; agencies should have a plan for managing both and should communicate these plans to the Congress. With a clearer understanding of the agency's vision and goals, the Congress will be in a better position to make informed oversight decisions and assist in resolving difficult issues. Both Senator Frank Lautenberg and Representative Edward Markey highlighted the importance of working together to resolve the technology challenges facing the government.

Principle 3: Service to the Public Should Be the Vision's Cornerstone

Successful use of information technology requires understanding the needs of the customer and letting those needs dictate how technology is used. Government typically focuses its attention on internal operational needs, with little regard to an important aspect of its mission—meeting the needs and desires of the American public. Planning for information technology without considering the needs of the public can backfire, resulting in underutilized systems, increased costs, and dissatisfied customers.

During the symposium, industry leaders repeatedly emphasized that their organizations' strategies were driven to a large extent by the needs of their customers. According to Barry Kotar, Covia Corporation's technology plan is based on a comprehensive assessment and understanding of the customer's priorities and needs. In many federal agencies, the services they provide are limited by what their systems can handle, not what the taxpayer wants. Successful leaders must be in a position to anticipate how their technology systems can accommodate changes in taxpayer requirements. Echoing this point, Jim Grant observed that forming a virtual partnership with the customer is essential for developing a service-oriented system.

Agencies should actively seek to identify and understand the taxpayers' needs, both now and in the future, and not rely on the perceived demands of the past.

Senior executives should make a concerted effort to understand and incorporate the needs of the American public in developing information technology strategies. They must actively seek to identify and understand the taxpayers' needs, both now and in the future, and not rely on the perceived demands of the past. Specific vehicles for obtaining this information could include customer surveys and pilot testing. Evidence that agencies are listening to taxpayers' views will encourage a sense of confidence that scarce tax dollars are being used appropriately.

Principle 4: A Clear, Flexible Architecture Should Support the Vision

Information systems are one of the most important tools for effectively accomplishing the organization's mission. For maximum efficiency and effectiveness, these systems should be developed as part of an overall architecture or plan. An architecture is a blueprint explaining the structure of and communications among an organization's information technology resources—hardware, software, and people. It is the foundation upon which an agency builds, modifies, and expands its organizational operations.

A comprehensive plan or architecture should drive all major technology purchases.

The architecture should drive all major technology purchases. Rather than simply buying information technology without a clear plan for how it will fit into the agency's overall strategy, leaders need a comprehensive plan that will dictate the equipment and resources required. This should reduce the likelihood of acquiring inappropriate or duplicate technology and ensure that the technology can be integrated with existing systems. Developing a collection of independent information systems with no underlying foundation or architecture is unacceptable.

A clear, well-conceived architecture also offers the possibility of building an integrated information system one piece at a time, thereby minimizing the risks inherent in an all-or-nothing strategy. Constructing a system incrementally provides flexibility to modify or expand the system in response to changes in customer needs, legislative requirements, or technological advances. Barry Kotar, for example, built Covia's system incrementally using proven building blocks, thereby reducing the project's risks. This modular approach also enables the customer to begin reaping the benefits of the system sooner. The symposium participants agreed that it was preferable to avoid very large, monolithic projects in favor of developing smaller, modular components within the architecture.

Principle 5: Management Continuity Is Needed to Implement the Vision

Continuity at the project management level is essential to realizing the vision. In the past, government has had difficulty maintaining the continuity necessary to provide consistent direction and clear accountability for information systems development efforts. All too often, changes in management occur that significantly affect the direction of an information systems project, thereby increasing costs, delaying the delivery of the project's benefits, and clouding accountability for the project's success.

Continuity of highly qualified technical staff is critical to successfully building information systems.

Assembling and retaining a team of highly qualified officials to manage critical information systems projects is essential to implementing the vision. Jim Grant stressed that the quality of the people supporting the leaders in the organization will determine whether the vision can be carried out. Operating on this philosophy, The Royal Bank of Canada established an intensive university recruiting program to ensure that highly skilled students are being hired. In this vein, symposium participants agreed that a move toward professionalizing the field of information resources management would enhance the quality of project managers. Suggestions offered included establishing a governmentwide training curriculum and developing a federal project management methodology.

Since retaining key, highly qualified officials to maintain continuity within technology projects is a major dilemma, agencies should explore new ways of bringing continuity to the process of managing these projects. For example, developing a detailed long-term strategy that can transcend personnel changes would mitigate some of the risks associated with management turnover. Using advisory committees and individual consultants to provide consistent institutional memory and perspective would also help achieve continuity.

The Challenge for the Future

As we move toward the next century, information technology promises to provide higher quality government services at reduced cost to the public. The challenge of making this promise a reality rests primarily with our leaders, who must provide the commitment and vision necessary to change the way government operates in this critical arena. Specifically, GAO believes that for this endeavor to be successful, federal leaders will need to

- charge the senior information resources management official in each agency with defining and implementing a clear yet flexible architecture that embodies the agency's vision of how it will do business in the future;
- encourage the formation of internal and external partnerships through organizations such as architecture planning committees, review boards, or advisory committees;
- clearly explain the agency's overall vision and direction in providing information to the Congress;

- ground all technology decisions in a thorough understanding of the needs of the public;
- adopt a modular approach to developing major systems and consider capping the size of project phases where implementation risks are high;
- explore ways of professionalizing the field of information resources management, such as establishing a governmentwide training curriculum and developing a federal project management methodology; and
- foster continuity through the use of detailed long-term plans, advisory committees, and individual consultants.

These steps constitute a promising agenda for action, but they are only a beginning. The dialogue begun during the symposium must be continued, new insights must be shared, and new solutions must be found if the government is to meet its technology challenge.

The time to act is now. The information technology crisis the government is facing will not resolve itself; it requires immediate action and continuing attention. Committed, visionary leadership is needed to address this crisis. Agency heads should demonstrate this leadership by applying the framework to their strategies for acquiring and managing information technology.

Appendix I

Biographies of Industry Speakers

John F. Fisher
Banc One Corporation

John Fisher is Senior Vice President for Banc One Corporation. Known today as an innovator in electronic consumer banking, Banc One enjoys great success: it is the third most profitable bank in Ohio's five-state area and boasts over $36 billion in assets.

Mr. Fisher's first major banking innovation was the bank credit card. In 1966, Banc One joined with Bank of America, which enabled Banc One to market the credit card nationally. The BankAmericard, later renamed Visa, was the first nationally accepted credit card and established Banc One as a banking leader. Under Mr. Fisher, Banc One also produced the first on-line credit-card authorization service and the first form of overdraft protection, linking credit cards together with checking accounts. Mr. Fisher has set a precedent in the industry by demonstrating the close relationship between technology and banking in meeting the needs of the customer.

J.C. (Jim) Grant
The Royal Bank of Canada

Jim Grant is the Executive Vice President for Systems and Technology at The Royal Bank of Canada. The Royal Bank is Canada's largest, with assets exceeding U.S.$90 billion and having 1,500 domestic branches plus 240 international offices.

Headquartered in Montreal and Toronto, the Royal Bank has been a leader in the application of new technologies for efficient operational management and for providing a variety of sophisticated services. Under Mr. Grant's leadership, the Royal Bank has expanded its electronic network for both personal and commercial banking.

Barry A. Kotar
Covia Corporation

Barry Kotar is President and Chief Executive Officer of Covia Corporation, a position he has held since the company was formed in January 1987 as an operating subsidiary of United Airlines. In August 1988, United sold half of Covia to five other air carriers, forming a partnership with USAir, British Airways, KLM Royal Dutch Airlines, Swissair, and Alitalia.

Covia is the leading worldwide travel distribution company. Under Mr. Kotar's leadership, the company develops and markets advanced automation products, information systems, and network services, including the world's most advanced computer reservation system. Mr. Kotar's philosophy stresses developing systems that will support corporate growth and expansion in the future.

Gen. Donald R. Lasher
United Services Automobile Association

Donald Lasher is President of Information Services for United Services Automobile Association, an insurance and financial services company noted as a technological leader. General Lasher provides the automated systems, communications, and computer support for all USAA activities. Directing a 1,500-person systems and telecommunications staff, he oversees an operation whose budget exceeds $125 million annually and includes the world's largest automatic telephone call distribution system under one roof.

At USAA, General Lasher spearheaded development of an automated, multifunctional workstation environment with on-line, real-time support to over 11,500 users worldwide. He also directed the development of a highly successful image-processing system that captures and stores all of USAA's incoming property and casualty policy service mail.

Appendix II
Symposium Panelists

Dr. Maryam Alavi, Associate Professor of Information Systems, University of Maryland

Jack L. Brock, Director, Government Information and Financial Management, U.S. General Accounting Office

Herbert R. Doggette, Jr., Deputy Commissioner for Operations, Social Security Administration

John R. Dyer, Deputy Commissioner for Management, Social Security Administration

Robert Gellman, Staff Member, Subcommittee on Government Information, Justice and Agriculture, House Committee on Government Operations

Edward J. Gleiman, Staff Director, Subcommittee on Federal Services, Post Office and Civil Service, Senate Committee on Governmental Affairs

Theodore F. Gonter, Director, Systems Engineering and Integration, Internal Revenue Service

Steven Katz, Chief Counsel, Subcommittee on Government Information and Regulation, Senate Committee on Governmental Affairs

Francis A. McDonough, Deputy Commissioner for Federal Information Resources Management, General Services Administration

Peter C.S. Nicoll, Manager, Business Management Program, The Royal Bank of Canada

Henry H. Philcox, Acting Assistant Commissioner, Computer Services, Internal Revenue Service

Fred L. Sims, Assistant Commissioner, Information Resources Management Policy, General Services Administration

Dr. Rona B. Stillman, Chief Scientist, U.S. General Accounting Office

Lynda Woodman, President, International Center for Information Technologies

Biographies of Congressional Speakers

Sen. Frank R. Lautenberg
State of New Jersey

Frank Lautenberg represents the state of New Jersey in the United States Senate. Since 1985 he has been a member of the Senate Appropriations Committee, with key roles on various subcommittees. In 1987 Senator Lautenberg began chairing the Committee's Subcommittee on Transportation.

After graduating in 1949 from Columbia University with a degree in economics, Senator Lautenberg began selling payroll services for a small business in New Jersey. Aided by computer technology, this business evolved into Automatic Data Processing (ADP), Inc., marking the beginning of the American computing services industry.

Over the past 30 years, ADP, Inc., has become a worldwide leader in the computing industry. Senator Lautenberg served as Chief Executive Officer and Chairman of the Board until elected to the Senate in 1982. Today, ADP is the largest computing services firm in the world, with annual revenues of more than $1 billion and more than 22,000 employees.

Rep. Edward J. Markey
Seventh District
of Massachusetts

A graduate of Boston College School of Law, Edward Markey was elected to the Congress in 1976 from the seventh district of Massachusetts. Since his election to the Congress, he has risen steadily in the ranks of its committee structure.

In 1987 Representative Markey took over the chairmanship of the Telecommunications and Finance Subcommittee of the Energy and Commerce Committee, a post that holds particular interest for him because of Boston's growing financial sector and Massachusetts' role as a leader in the high-technology community. As subcommittee chairman, he presides over interstate and foreign telecommunications, including all telecommunications and information transmission. Representative Markey's recent efforts involve overhauling the regulation of securities laws to prevent a recurrence of the stock market crash of 1987.

Appendix IV

Major Contributors to This Report

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[ERRATA]

S. Hrg. 101-588

REAUTHORIZATION OF OMB'S OFFICE OF INFORMATION AND REGULATORY AFFAIRS

HEARINGS

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1742

FEDERAL INFORMATION RESOURCES MANAGEMENT ACT

FEBRUARY 21, 22, 1990

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S401-31

ERRATA

Page number 16 in S. Hrg. 101-588 was incorrectly printed. The correct page is printed on this errata.

sideration of statistical policy appears to have taken place within OIRA as personnel has changed. But the controversy remains pertinent because it illustrates the manner in this specific instance in which OIRA exploited its authority under the Paperwork Reduction Act to justify arbitrary and unreasonable interference in a very important statistical matter. I believe the legislation before you goes a long way to minimize the likelihood that such an arbitrary interference will recur in the future.

Senator Bingaman has been very sensitive in trying to balance all of the interests involved here, both on the side of reducing paperwork and on the side of maintaining the integrity of our national statistics, I applaud his efforts and the efforts of this Committee to move forward with legislation that will provide a constructive framework for our Federal statistical policy.

Thank you very much.

Chairman GLENN. Thank you very much.

I just have one question since you have looked into this and held hearings on it: Why did they suggest the one-third cut in the Census form? Was this ideological, or was it just done on the basis of simplification of the form? What reason was given for the cut?

Senator SARBANES. Well, first of all, they asserted, when they were questioned about it, that they weren't necessarily going to do it, that they were just raising some questions. The Census Bureau, as I indicated, had perceived it the other way.

We never really got the answer. There are some who perceive that questions were being eliminated because, you might say, if you don't know what the housing situation is, then you "don't have a housing problem"—you haven't done the survey and so you don't have the information available to you. I don't know whether that is the case or not.

These forms had been very carefully developed over a number of years with the participation of everyone, including very heavy involvement by the private sector through a public process. And much of the reaction that the SEC received came from the private sector, which said, "We rely on this census for a whole range of information that is important to us in planning investment strategy, a production strategy, marketing strategy, and so forth, and of course if it is not collected by the census, there is no one else to do it."

Chairman GLENN. Senator Heinz, any questions?

Senator HEINZ. No questions. Thank you, Mr. Chairman.

Chairman GLENN. Senator Bingaman?

Senator BINGAMAN. I have no questions. I appreciate Senator Sarbanes being here, and I know that the statistical issues are a crucial part of what we are trying to improve through this legislation. I appreciate his interest.

Thank you, Paul.

Senator SARBANES. Thank you very much.

Chairman GLENN. Thank you very much.

Is Congressman Weiss here? He was going to testify also. I don't believe he has arrived yet. We will take him when he comes.

Our next witness is James B. MacRae, Jr., Acting Administrator, Office of Information and Regulatory Affairs—OIRA—of the Office of Management and Budget.